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No. ———

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1988

CUDAHY COMPANY and GENERAL HOST CORPORATION,
Petitioners,

v.

CECIL W. MILLER, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the Due Process Clause imposes any limitations on an award of punitive damages where a federal district court in a diversity action has exercised unrestrained discretion in awarding $10 million in punitive damages against petitioners in ongoing litigation and where additional awards of actual and punitive damages may be assessed, in unlimited and unpredictable amounts.

2. Whether the Excessive Fines Clause of the Eighth Amendment applies to an award, in a diversity action, of punitive damages, designed to "punish" petitioners and "deter" others, and, if so, whether an award of $10 million in this case is excessive.

3. Whether judicial application of a damage rule that permits recovery of compensatory damages many times in excess of the value of real property to "compensate" for temporary and partial damage to that property violates either the Takings Clause or the Due Process Clause.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Cudahy Company ("Cudahy") and General Host Corporation ("General Host") hereby petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Tenth Circuit in this case. One of the three questions presented in this case parallels the Eighth Amendment punitive damages issue which the Court already has decided to review in *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, No. 88-556. At a minimum, therefore, this petition should be held pending the determination of *Browning-Ferris* on the merits. The other two questions presented are independently worthy of this Court's review, so that regardless of the outcome in *Browning-Ferris*, this petition should be granted.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Tenth Circuit (app. at 1) is reported at 858 F.2d 1449 (1988). The opinion of the district court denying petitioners' motion for partial summary judgment (app.

at 178) is reported at 567 F. Supp. 892 (D. Kan. 1983). The opinion of the district court holding petitioners liable and imposing compensatory and contingent punitive damages (app. at 116) is reported at 592 F. Supp. 976 (D. Kan. 1984). The opinion of the United States Court of Appeals for the Tenth Circuit dismissing petitioners' appeal from the 1984 district court opinion as premature (app. at 111) is not reported. The opinion of the district court denying petitioners' post-trial motions, rejecting all proposed remedial action plans and imposing a $10 million punitive damage award (app. at 25) is reported at 656 F. Supp. 316 (D. Kan., 1987).

JURISDICTION

The judgment of the court of appeals was entered on September 28, 1988. The petition for rehearing was denied on November 1, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in pertinent part:

> No person shall be . . . deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

U.S. Const. amend. V.

The Eighth Amendment to the United States Constitution provides in pertinent part:

> Excessive bail shall not be required, nor excessive fines imposed . . . .

U.S. Const. amend. VIII.

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

> No State shall . . . deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. amend. XIV.

STATEMENT

1. This is a diversity action based on damage to real property. Respondents claimed that the salt mining operations of the Lyons, Kansas plant of American Salt Company ("American Salt") and its predecessors over a 60 year period caused the pollution of an underground aquifer which passes under the plant and flows thereafter under respondents' lands. The presence of salt in the aquifer rendered the water unfit for agricultural irrigation and thereby reduced the value of respondents' farm lands.[1] At the time the lawsuit was filed (May 31, 1977), American Salt was an operating division of petitioner Cudahy Company, which had been a subsidiary of petitioner General Host for about six years.[2]

Respondents are owners and lessees of approximately 2800 acres of farm land with a value, according to their own calculations, of $1,100 dollars an acre or a total value of $3.08 million. Respondents sought compensation for the permanent decrease in the value of their land due to their long-term inability to use the contaminated water in the aquifer to grow irrigated crops. The salt water

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[1] The only contaminant at issue is sodium chloride or common table salt.

[2] In 1972 General Host acquired all of the stock of Cudahy, then a public company and one of the nation's major meat packers. American Salt Company was a minor subsidiary of Cudahy. For 1977, the year that this action was filed, General Host had a net worth of about $45 million and less than 10% of its total assets were invested in American Salt. At year end 1983, General Host's net assets were about $147 million—not $450 million as stated by the trial court. This increase of about $100 million was largely attributable to gains on sales of businesses and the sale of common stock or conversion of debt into common stock.

contamination did not affect non-irrigated crops and therefore the dry land value of the farmland was undiminished. Thus, respondents sought total compensatory damages of $1.26 million (or $450 dollars per acre), the difference between the local fair market price per acre of irrigable land ($1,100 per acre) and dry land ($650 per acre). Complaint, 10.[3]

2. In June 1983, the district court denied petitioners' motion for partial summary judgment based on the applicable two-year statute of limitations. Petitioners argued—and the court later found—that the salt water pollution of the aquifer had existed since at least the 1940's. App. at 125-138.[4] Moreover, all of the respond-

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[3] Corn, which requires irrigation in that part of Kansas, is usually more profitable than dryland crops, such as wheat and milo. Nevertheless, respondents could, and did, "grow unirrigated wheat and milo crops of considerable value each year." App. at 139.

[4] Various solution mining techniques used by American Salt (or its predecessor) from the outset of operations in 1908 until they were discontinued by the 1960's allowed substantial amounts of salt water to escape into the aquifer. *See* app. at 126-137; Brief for Defendants-Appellants at 8-10, *Miller* v. *Cudahy Company*, No. 87-1502 (10th Cir., July 23, 1987). Because the aquifer flows beneath the plant and respondents' properties at the glacial rate of only one mile every ten years or more (app. at 119) and because a natural clearing of salt from the aquifer could take up to 200 years (app. at 78), pollution from past operations will continue to affect the groundwater under respondents' land for many decades even though no further salt escapes from American Salt's property.

For the past thirty years, American Salt has been engaged in pollution control and abatement activities. *See, e.g.*, Tr. 27-663; Brief for Appellants, No. 87-1502 (10th Cir., July 23, 1987). at 13-20. Indeed, respondents' expert conceded that ongoing groundwater monitoring instituted by American Salt suggested a gradual clearing of salt pollution. Tr. 15:2044-48, 2100. Respondents' expert also testified he could not state that pollution occurring since 1977 had contributed even as much as 1% of the salt in the aquifer. Tr. 33:80-82.

ents (except one) admitted at trial that they had known of the salt pollution since 1970 at the latest.[5]

Nevertheless, despite the permanent nature of the injury, the district court concluded that the statute of limitations did not bar respondents' claims. Instead, the court stated that respondents' allegations of continuing nuisance were sufficient to plead a "temporary" injury arising from an "abatable nuisance." App. at 206, 208-212. Under the court's interpretation of Kansas law, such injuries give rise to claims for "temporary" damages that may be filed every two years "at least so long as some acts of pollution continue" or for as long as the "temporary" injury persists. Under the latter standard, because an accelerated cleanup of existing salt pollution could take up to 100 years, the biennial litigation in this case could continue well into the twenty-first century.[6]

Following a bench trial, the district court concluded that the salt plant constituted a "continuing nuisance" which was responsible for the injury in question, *i.e.*, respondents' inability to use the groundwater to grow

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[5] *See* Brief for Defendants-Appellants at 9-10, *Miller* v. *Cudahy Company*, No. 87-1502 (10th Cir., July 23, 1987).

[6] Under this doctrine of "temporary damages," the statute of limitations was held to preclude plaintiffs from recovering compensatory damages prior to two years before they filed suit (app. at 211-212), but to allow future recovery of "temporary" damages in two-year increments for as long as the damage standard is met. No such time limitation was applied with respect to the award of punitive damages. Indeed, General Host clearly was held liable in punitive damages for conduct that occurred long before it owned American Salt. Respondents already have filed their next two lawsuits for compensatory and punitive damages. *See Brothers* v. *American Salt Co*, Civ. No. 84-1637-T (D. Kan.) (requesting an additional $2 million in compensatory damages and an additional $25 million in punitive damages); *Heirs of Sharpe* v. *American Salt Co.*, Civ. No. 87-1345-K (D. Kan.).

irrigated crops. "Because irrigated corn would be more profitable for the plaintiffs than the dryland crops," the court found that respondents' damages properly would be measured "to the extent of these lost crop profits," instead of reduced rental value. App. at 139. Based on a calculation by respondents' expert of the differences in profits between theoretical irrigated corn crops and theoretical dryland crops, the court awarded $3,060,000 in damages for "lost crop profits" for 1975-1983. App. at 138-142.[7]

The district court also held that it had the equitable power to order a cleanup but lacked "sufficient knowledge or information to order the defendants to undertake any particular remedial program." App. at 125. The court therefore entered a contingent punitive damage award of $10 million and ordered petitioners to conduct a remedial investigation.[8] App. at 153-154, 176. The $10 million

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[7] This award of "temporary" damages far exceeded the undisputed amount of permanent damage to the land—the difference between the local fair market price of irrigable land ($1,100 per acre) and dry land ($650 per acre). Such an award of permanent damages—$1,260,000 for 2800 acres—is precisely what respondents sought in their original complaint. Moreover, even if "temporary" damages were appropriate, the award far exceeded the undisputed testimony regarding the reduced rental value of the property over the course of nine years (*i.e.*, $715,260). *See* app. at 141; Def. Exhibit Z-7.

[8] The $10,000,000 punitive damages figure was based in part on an erroneous calculation of General Host's 1983 net assets as $450 million. In fact, General Host's total assets for that year were about $450 million; its 1983 net assets were $147 million. This basic error —undisputed by respondents—was repeatedly brought to the attention of the district court, but the court nevertheless ignored its mistake.

Moreover, although there was a complete absence of evidence of any type of abuse of the corporate form which would warrant "piercing the corporate veil," the court nevertheless held—on a novel "agency" theory—that General Host was liable for all of the damages on the ground that it failed to cause a division of its subsidiary to terminate the division's president's employment. App. at 121-125.

contingent punitive damage award was subject to reduction in "whole or in part," if the defendants proposed and implemented a feasible remediation plan. App. at 174, 175; May 23, 1986 Opinion and Order.

For almost two years, petitioners conducted the court-ordered remedial investigation, app. at 95-101,[9] and the district court held a series of extensive evidentiary hearings on the status and results of the investigation.[10] In their April 1986 Report, the petitioners submitted to the district court a proposed remedial plan—the Ten Interceptor Well Plan—that had the approval of respondents' expert, petitioners' experts, and three interested Kansas state agencies. App. at 84-88. During the one-year period between petitioners' submission of this "favored plan" and the issuance of the court's final opinion, American Salt and Cudahy entered into a consent decree with the Kansas Department of Health and Environment ("KDHE") and agreed to implement the Ten Interceptor Well Plan as generally described in the April, 1986 report to the court. See April 1986 Remedial Report, 23.[11] Once

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[9] The remedial investigation and reports required the generation of enormous amounts of scientific and engineering data and evaluations which cost over $1.7 million dollars to the petitioners. App. at 99. The $1.7 million dollar cost of developing the remedial plan includes only out-of-pocket costs of outside experts and drilling crews and does not include the thousands of man-hours spent by American Salt personnel on this unprecedented enterprise.

[10] Based on the results of the remedial investigation, the court held that its 1984 findings on remediation times (5 to 15 years with acceleration, 30 years naturally) "have proved to be off by . . . a factor of ten to twenty." App. at 76; app. at 97 (aggressive remedial plan would take 75-150 years to cleanse aquifer).

[11] The Ten Well Interceptor plan will accelerate the remediation process so that the groundwater will be irrigable in 70-100 years. This plan, which will cost in excess of $4.8 million (including the $1.7 million remedial investigation), is the first known implementa-

implementation of the plan (which was endorsed and developed in conjunction with respondents' expert) was assured, respondents belatedly voiced an objection to any court ordered plan and stated a preference to receive the $10 million instead. App. at 99-101, 106-107. Based largely on this objection, the district court held that "no feasible [remedial] plan has been presented" and that petitioners had proceeded in "bad faith." App. at 105-107. Accordingly, the court refused to remit any of the $10 million punitive damage award.[12]

3. On appeal, the Tenth Circuit affirmed in all major respects.[13] Despite the 1987 finding of the district court that the pollution was "not remediable within a reasonable time" (app. at 76, 98, 108), the court of appeals, in its ruling on the "temporary/permanent" damages question, declined to look beyond the 1984 trial record and concluded that "it is apparent to this court that . . . the cleanup process can be . . . achieved within a reasonable time." App. at 11. Given this "factual" conclusion (and a determination that the contrary findings made in the

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tion in the United States of a program to accelerate cleanup of aquifer saltwater pollution. Tr. Jan. 1986 Hearing, 2:85-88.

With full knowledge of the court's findings and the remedial investigation results, the KDHE determined not to impose any civil fine on American Salt or Cudahy (and to completely excuse General Host from its proceedings), although it had statutory authority to impose civil fines. Thus, the decision of the trial court in this case to impose its own "fine" stands in direct contradiction to the judgment of the Kansas legislative (*i.e.*, in setting the range of penalties for the conduct at issue) and executive branches (*i.e.*, the KDHE determination that no fine was warranted).

[12] The district court also imposed over $2 million in interest on the "contingent" punitive damages award for the time that petitioners were engaged in the court-ordered remedial investigation.

[13] The only issue on which the judgment of the district court was not affirmed was the assessment of post-trial expert witness fees. App. at 24.

subsequent "remedial" phase of the proceeding would not be considered in determining liability), the court of appeals concluded that respondents' claim properly was characterized as "a continuing nuisance causing temporary damages." *Id.* at 12. Thus, the court held that the district court did not err in denying petitioners' statute of limitations defense.

The court of appeals also relied on its finding that the damages were "temporary" in affirming the lower court's holding on actual damages. Although the court apparently recognized that the measure of "temporary" damages in question would substantially exceed the recovery for permanent damages (*i.e.*, the diminished market value of the land) and that the decision below could give rise to a virtually endless cycle of biennial "temporary" damage actions, the court declined to set aside the district court's ruling regarding the "proper measure" of compensatory damages. *Id.* at 13-15.

The court also held that the amount of actual and punitive damages awarded by the district court was "not clearly erroneous" or an abuse of discretion. App. at 15. With respect to petitioners' argument that the punitive damage awards violated the "[E]ighth and [F]ourteenth [A]mendments to the United States Constitution," the court held that it could find no "persuasive federal constitutional authority" to support that argument. App. at 19.

On Petition for Rehearing, petitioners argued that if the court of appeals were correct in interpreting state law "to permit a property damage award exceeding the value of the property, such a state rule would violate both the Takings and . . . Due Process Clauses of the Fifth and Fourteenth Amendments." See Petition for Rehearing and Suggestion of Rehearing En Banc at 8, *Miller* v. *Cudahy Company*, No. 87-1502 (October 21, 1988). The petition for rehearing was denied "on the merits" by the

Tenth Circuit on November 1, 1988. See Order Denying Petition for Rehearing, *Miller* v. *Cudahy Company*, No. 87-1502 (Nov. 1, 1988). App. at 215.

REASONS FOR GRANTING THE PETITION

This case presents the Court with a clear opportunity to decide whether and to what extent the Due Process Clause, the Excessive Fines Clause or the Takings Clause of the United States Constitution imposes substantive limitations on the discretion of a court to impose damage awards under state law. The courts below have assessed an extraordinary damage award against petitioners which, to date, exceeds $18 million (including interest) for *partial* damage to land that has an undisputed *total* undiminished market value of less than one-fifth of the damage award. But that is not all. The lower courts' damage meter continues to run beyond the $18 million figure, and potentially will continue to run for most of the twenty-first century. Under the decisions below, every two years—for 75, 100, or even 150 years—there may be a new award of additional damages. The $18 million award in this case can be sustained only if this Court holds that the Constitution provides absolutely no protection to a defendant against excessive damage awards in civil litigation under state law.

The petition in *Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, No. 88-556 ("*Browning-Ferris*"), which the Court already has decided to review, raises one important issue concerning the constitutional limitations on damages: whether the Eighth Amendment's prohibition against excessive fines imposes any limit on the imposition of punitive damages. This petition presents two additional, related, and equally important questions. One of them—the limitations on punitive damages imposed by the Due Process Clause—may or may not be reached in *Browning-Ferris*. But the present case also raises at least one constitutional issue that

is unquestionably not before the Court in *Browning-Ferris*: whether the imposition of a compensatory damage award which admittedly will exceed, by a substantial multiple, the value of the property that is damaged violates either the Takings Clause or the Due Process Clause. At a minimum, this Court should hold this petition pending disposition of *Browning-Ferris*. But no matter how the Court decides *Browning-Ferris*, it still should grant this petition in order to consider the two fundamental and recurring issues squarely presented by this case but not by *Browning-Ferris*.

I. THIS COURT SHOULD CONSIDER WHETHER THE PUNITIVE DAMAGE AWARD IN THIS CASE VIOLATED THE EIGHTH AND FOURTEENTH AMENDMENTS

The punitive damages imposed in this case violated both the Fifth and Fourteenth Amendments' prohibition against deprivations of property without due process and the Eighth Amendment's prohibition against excessive fines. The basic facts relevant to both the due process and excessive fines issues are simple and uncontested. The district court imposed a $10 million punitive damage award in order "to adequately punish the corporate wrongdoers and to serve as a credible example to restrain and deter others . . . ." App. at 153-154. Neither the punitive nature nor the excessive magnitude of the award in this case seriously can be challenged.[14]

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[14] Net annual profits for the salt plant have ranged from $1 million to $1.75 million since 1975. Nevertheless, the court stated that the size of the award was "appropriate" because of General Host's alleged net assets of over $450 million. App. at 153-154. The imposition of "punishment" of such magnitude on General Host's shareholders was unwarranted in light of the fact that General Host did not acquire American Salt until 1972 and most of the cited conduct took place years, if not decades, prior to that time. In fact, a pollution abatement program was well underway at the time that General Host acquired American Salt. *See supra*, at 4 n.4.

A. The Due Process Clause Limits The Imposition Of Arbitrary Punitive Damage Awards

Two years ago, in *Aetna Life Insurance Co.* v. *Lavoie*, 475 U.S. 813 (1986), the Court stated that the argument that the "lack of sufficient standards governing punitive damages awards . . . violates the Due Process Clause" was an "important issue[] which, in an appropriate setting, must be resolved." Last Term, in *Bankers Life and Casualty Co.* v. *Crenshaw*, 108 S.Ct. 1645 (1988), the Court granted certiorari but declined, for prudential reasons, to reach the issue whether the imposition of punitive damages could violate the Due Process Clause. This case squarely presents that due process issue in a setting appropriate for resolution by this Court.

1. Justice O'Connor, concurring in part in *Bankers Life*, in an opinion joined by Justice Scalia, observed that it is the inherently arbitrary nature of punitive damage awards that renders them susceptible to due process challenge. *Bankers Life*, 108 S.Ct. at 1656 (the "grant of wholly standardless discretion to determine the severity of punishment appears inconsistent with due process"). This is so because punitive damages are intended to punish—not compensate—so there is no objective "actual damages" benchmark against which they may be assessed. *Gertz* v. *Welch, Inc.*, 418 U.S. 323, 350 (1974) (purpose of punitive damages "to punish" and "to deter").[15] Thus—absent some clearly articulated standard for, or limitation on, the award of punitive damages—"the impact of these windfall recoveries is unpredictable and potentially substantial." *Bankers Life*, 108 S.Ct. at 1655

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[15] *See City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 266-267 (1981) (punitive damages "intended . . . to punish the tortfeasor"); Restatement (Second) of Torts, § 908 (1979); W. Prosser, Law of Torts 9-10 (4th ed. 1971); *see also Hicks* v. *Feiock*, 108 S.Ct. 1423, 1437 (1988) (O'Connor, J., dissenting) (no "compensatory purpose limits the amount of the fine"); *Silkwood* v. *Kerr-McGee Corp.*, 464 U.S. 238, 276 n.3 (1984) (Powell, J., dissenting).

(quoting *Electrical Workers* v. *Foust*, 442 U.S. 42, 50 (1979)). See *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 82-83 (1971) (Marshall, J., dissenting).

The view expressed in the concurring opinion in *Bankers Life*, that punitive damages such as those imposed here violate the due process guarantee, clearly is correct. Where did the district court's $10 million damage award come from? It bears no relationship, rational or otherwise, to the damage suffered by the respondents (*i.e.*, the lost opportunity to change their manner of farming to irrigation). Nor does it fairly reflect the blameworthiness of General Host.[16] Instead, the district court simply picked a number based on the parent company's perceived net worth, as did the Mississippi courts in *Bankers Life*. But in doing so, the court imposed a penalty wholly out of proportion to the offense and therefore its result is simply arbitrary and in contravention of the Due Process Clause.

2. It is well established that due process requires the state to define clearly the conduct that it intends to make

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[16] In this case, the district court's decision to look to the assets of General Host Corporation as an indication of an appropriate punitive damage award illustrates how entirely arbitrary such awards may be. Despite the complete absence of any facts that would warrant "piercing the corporate veil," *see* Brief for Defendants-Appellants at 52-58, *Miller* v. *Cudahy Company*, No. 87-1502 (10th Cir., July 23, 1987), General Host has been "fined" $10 million based largely on damages allegedly caused by its subsidiary at a time prior to General Host's purchase of Cudahy (in 1972) and of which it was unaware. Under this theory, if IBM—rather than General Host—had purchased American Salt, then IBM's entire net worth would form the basis of an appropriate punitive damages award and plaintiffs presumably would be entitled to hundreds of millions of dollars in punitive damages. Such a system of civil damages, through which the entire net worth of a parent company is threatened by every purchase of assets (no matter how miniscule) and every act of the company's subsidiaries (past and present), could not be more arbitrary.

subject to punishment. See *Papachristou* v. *City of Jacksonville*, 405 U.S. 156 (1972); *Edwards* v. *California*, 314 U.S. 160 (1941). This demand for specificity includes a requirement that the state, through its legislature, provide notice of the maximum penalty for a given act. See *United States* v. *Evans*, 333 U.S. 483, 486-87 (1948). Thus, in the criminal context, the courts' discretion to impose punishment must be limited by statutes that establish "the permissible punishment alternatives" and "demarcate the range of penalties" for particular conduct. *United States* v. *Batchelder*, 442 U.S. 114, 126 (1979).

The force of these due process limits on the state's power to sanction "is not to be avoided by the simple label a State chooses to fasten upon its conduct or its statute." *Giaccio* v. *Pennsylvania*, 382 U.S. 399, 402 (1966). Thus, the potential sanctions imposed through the "civil" penalty of punitive damages should be no less subject to due process standards than the imposition of purely "criminal" penalties. See *Ingraham* v. *Wright*, 430 U.S. 651, 669 (1977). As the imposition of multi-million dollar punitive damage awards becomes increasingly commonplace,[17] this Court should grant certiorari

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[17] *See, e.g., Browning-Ferris Industries of Vermont, Inc.* v. *Kelco Disposal, Inc.*, 845 F.2d 404 (2d Cir. 1988), *petition for cert. granted*, No. 88-556 (Dec. 5, 1988) (jury awarded compensatory damages of $51,000 and punitive damages of $6 million); *Metromedia, Inc.* v. *April Enterprises, Inc.*, No. 88-625 (petition for a writ of certiorari pending in case involving jury award of actual damages of $3.8 million and punitive damages of $14 million); *Goodyear Tire & Rubber Company* v. *Hodder*, No. 88-626 (petition for a writ of certiorari pending in case involving jury award of actual damages of $3.4 million and punitive damages of $12.5 million, which was reduced on appeal to punitive damages of $4 million); *Ainsworth* v. *Combined Insurance Co.*, 763 P.2d 673 (Nev. 1988) (award of actual damages of $200,000 and punitive damages of $6 million); *see also* Jeffries, *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 140-146 (1986);

and consider the extent to which the Due Process Clause limits the discretion of a court in a common law diversity action to impose punitive damages, based solely on its ad-hoc assessment of how much punishment is enough.

B. The Excessive Fines Clause Of The Eighth Amendment Limits The Imposition Of Arbitrary Punitive Damage Awards

This Court has noted that "whether the Eighth Amendment's Excessive Fines Clause serves to limit punitive damages in state civil cases—is a question of some moment and difficulty." *Bankers Life*, 108 S.Ct. at 1651; see *Aetna Life Ins. Co.*, 475 U.S. 813, 828-829 (question whether punitive damages award is impermissible under the Excessive Fines Clause "raise[s an] important issue[] which, in an appropriate setting, must be resolved"); see also *City of Yonkers* v. *United States*, 57 U.S.L.W. 3183, 3184 (Sept. 1, 1988); (Marshall, J., concurring in denial of stay) (quoting *Bankers Life and Casualty Co.*, 108 S.Ct. at 1651).

1. Despite the fact that punitive damages commonly are considered to be an element of "civil" damages, this characterization alone should not preclude application of the Eighth Amendment. As this Court noted in *Ingraham* v. *Wright*:

> [s]ome punishments, though not labeled "criminal" by the State, may be sufficiently analogous to criminal punishments in the circumstances in which they are administered to justify application of the Eighth Amendment.

430 U.S. 651, 669 n.37 (1977); see also *id.* at 685 (White, J., dissenting); *Smith* v. *Wade*, 461 U.S. 30, 59 (1983) (Rehnquist, J., dissenting); *Kennedy* v. *Mendoza-Martinez*, 372 U.S. 144, 165-166 (1963).

U.S. Dept. of Justice, Tort Policy Working Group, Update on the Liability Crisis, 47 (1987).

In determining whether a penalty that is nominally civil has the characteristics of a criminal punishment, and therefore is subject to constitutional restrictions primarily applicable to criminal proceedings, the Court has looked to a variety of factors, including:

> Whether the sanction involves an affirmative disability or restraint, whether it has historically been regarded as a punishment, whether it comes into play only on a finding of *scienter*, [and] whether its operation will promote the traditional aims of punishment—retribution and deterrence . . . .

Kennedy v. *Mendoza-Martinez*, 372 U.S. 144, 168-69 (1963) (footnotes omitted). Applying these standards, punitive damages possess most of the characteristics of a criminal-type sanction. Indeed, as this Court stated, "[p]unitive damages 'are not compensation for injury. Instead, they are private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence.'" *Electrical Workers* v. *Foust*, 442 U.S. at 48 (quoting *Gertz*, 418 U.S. at 350). Given the undisputed nature and purpose of punitive damage awards—both in general and in this case (app., 116)—application of the Eighth Amendment's Excessive Fines Clause plainly is warranted.

Moreover, the language of the Excessive Fines Clause is fully consistent with the application of that constitutional provision to sanctions imposed in civil cases. *Compare* U.S. Const. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed . . . .") *with* U.S. Const. amend. V ("No person shall be . . . compelled in any criminal case to be a witness against himself"); U.S. Const. amend. VI (provisions of amendment apply "[i]n all criminal prosecutions"). It is clear that when the draftsmen of the Bill of Rights intended to limit their guarantees to the criminal context, they knew how to do so.

2. Having shown that the Eighth Amendment applies to civil actions, the issue remains what constitutes an "excessive fine." Although there are a variety of potentially relevant measures of excessiveness (*Browning-Ferris* Pet. 24-28), one of the core concepts embodied in the Eighth Amendment generally is the notion of proportionality between the punished activities and the penalty imposed. See *Solem* v. *Helm*, 463 U.S. 277 (1983). The punishment—in this case a "fine"—must in some measure fit the offense. *Furman* v. *Georgia*, 408 U.S. 238, 279-280 (1972) (Brennan, J., concurring); *O'Neil* v. *Vermont*, 144 U.S. 323, 323-340 (1892) (Field, J., dissenting). As we have demonstrated previously (*supra*, —), the punitive award in this case was imposed without regard to the fault of General Host or its particular knowledge of any wrongdoing, but rather on the basis of its ownership of American Salt and General Host's net worth. A multimillion dollar award imposed on such a basis is not only arbitrary, but also it is grossly excessive. *Compare Solem* v *Helm*, 463 U.S. at 287 (1983).

In any event, this case should be held pending this Court's decision in *Browning-Ferris*. On December 5, 1988, this Court granted the petition for a writ of certiorari in *Browning-Ferris* on the question whether "an award of $6,000,000 in punitive damages . . . is excessive under the Eighth Amendment or otherwise." *Browning-Ferris* Petition, at I. That case involves a claim of predatory pricing, in violation of Section 2 of the Sherman Act, and a pendent state-law claim for tortious interference with business relations under Vermont law. The jury awarded compensatory damages of $51,000 on both the federal and state claims and punitive damages of $6 million. Browning-Ferris argues that such a punitive damage award, which was measured in terms of the defendant's net worth and annual revenues, is "grossly excessive" under "any objective standard" and therefore violates the Excessive Fines Clause of the Eighth Amendment. *Browning-Ferris* Petition at 24.

Any decision by this Court of the question presented in *Browning-Ferris* clearly would affect the proper disposition of the similar issue in this case. If this Court holds that the Excessive Fines Clause is applicable to an award of punitive damages, then the decision below—which flatly rejected that argument—should be vacated and the court below ordered to reconsider its decision in light of whatever standards for excessiveness this Court sets out in *Browning-Ferris*. Alternatively, even if the Court rejects the Eighth Amendment argument in *Browning-Ferris*, the question will remain whether a standardless, limitless award of punitive damages is permissible under the Due Process Clause. Because this case squarely presents that question, this Court should grant this petition.

II. THIS COURT SHOULD CONSIDER WHETHER THE COMPENSATORY DAMAGE AWARD IN THIS CASE VIOLATED THE TAKINGS AND DUE PROCESS CLAUSES OF THE FIFTH AND FOURTEENTH AMENDMENTS

The courts below have already awarded respondents "temporary" compensatory damages that are more than twice the allowable award for permanent damage (*i.e.*, the diminishment of respondents' land values) and that are virtually equal to the full fair market value of their land. According to respondents' own calculations, the total fair market value of their land is $3.1 million and the diminishment in value, if the damage is permanent, is $1.26 million. Respondents already have been awarded $3.06 million in compensatory damages for the *temporary* and *partial diminution* in the value of that land for a nine year period.

Moreover, under the decision below, respondents are still permitted to bring suit to recover additional damages every two years for a period of time that may last

over a century. Respondents already have filed two additional, separate actions for "temporary" injury to their land in which they have sought an additional two million dollars annually in compensatory damages for each two year period. Using the damage formula applied by the courts below and assuming that such biennial actions were allowed to continue until the aquifer is usable again, respondents could be awarded total damages for the partial temporary damage to their land in an amount anywhere from 10 to 20 times the fair market value of that land.

Obviously, the decisions below will have a resounding impact, not only on petitioners, but on any industry which is concerned with environmental liability or any other conduct which could be characterized as a continuing nuisance. The potential exposure to liability arising out of a continuing nuisance theory that permits "temporary" damage recovery to continue for decades until the effects of pollution have been entirely remediated is staggering. Indeed, if virtually unlimited awards of actual and punitive damages can be imposed in addition to multi-million dollar voluntary cleanup costs, the decision below creates a strong disincentive towards investment in any remedial efforts and a strong incentive towards abandonment of a previously polluting facility. Review of the Tenth Circuit's theory of recovery is necessary to eliminate this perverse disincentive.

At first blush, the notion that compensatory damages can constitute an unconstitutional taking is admittedly odd; all damage awards are in some sense a "taking." The state is requiring one private party to pay money over to another. And obviously, such awards are routinely granted without any serious constitutional objection. What distinguishes the damage award in this case, however, is not only its magnitude, but also its recurring

nature. This combination of features converts an ordinary damage award into a confiscatory taking.

By analyzing the effect of the "temporary damages" problem presented in this case against generally accepted principles in the Takings Clause, it becomes apparent that the Takings Clause does have a legitimate role to play in restricting the recovery available to respondents.[18] It is axiomatic that the State of Kansas could not enact a statute which permitted petitioners physically to invade respondents' property (or otherwise substantially destroy or interfere with its use) without paying compensation for such a "taking." See *Loretto* v. *Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982). It is equally clear that the State could not—consistent with the Due Process and Takings Clause—limit the damages for such a "taking" to 50% of the fair market value of the property. *Boston Chamber of Commerce* v. *Boston*, 217 U.S. 189, 195 (1910) (Holmes, J.); see Freund, Constitutional Law, 1102 (1977) ("the elementary principle is that market value at the time of the taking is the proper measure" of damages for the taking of property).

It follows naturally from these principles that the Due Process Clause and the Takings Clause would prohibit a state from giving a landowner the right, at his option, to require his neighbor to "purchase" his property at 10 to 20 times its fair market value.[19] But, that

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[18] The prohibition against the government taking private property without just compensation has been extended to the states through the Due Process Clause of the Fourteenth Amendment. *Chicago, B. & Q. R. Co.* v. *Chicago*, 166 U.S. 226, 239 (1897).

[19] At the very least, the state should be required to demonstrate that such a massive shifting of private resources is "substantially" related to some legitimate public interest. *See Nollan* v. *California Coastal Comm'n*, 107 S.Ct. 3141 (1987). No such showing has been attempted here.

is, in effect, what the state law damage rules, applied in this case by a federal court, provide. In fact, based on the rulings below, respondents probably would be unwilling to sell their "damaged" property for anything less than a significant multiple of its full market value because the potential income stream of future damages so far exceeds the amount. The lower courts' judgments have effectively converted respondents' farmlands into a gold mine.[20]

The property damage laws of the State of Kansas (as they have been interpreted by the courts below) conceivably permit a decades-long shifting of petitioners' assets to respondents. The "compensatory" damages awarded to date far exceed the amounts necessary to achieve the goal of providing compensation for the injury to respondents' land; instead, they simply amount to a shifting of private resources, which is prohibited by the Takings Clause.[21] See *Monongahela Navigation Co.*

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[20] The remedy for the Due Process Clause claim may not be identical to that for the Takings Clause claim. To the extent that this rule of compensatory damages is arbitrary or fails to meet the rationality requirement of the Due Process Clause, the rule would be an invalid exercise of the police power and its operation could be enjoined—even if compensation were paid. *See* Stoebuck, *Police Power, Takings, and Due Process*, 37 Wash. & Lee L. Rev. 1057, 1081-82 (1980). If, however, the state has a legitimate interest in "overcompensating" respondents for the dimunition in the value of their land (and the payment of such damages constitutes a public use), then operation of the rule could not be enjoined. *See Ruckelshaus* v. *Monsanto Co.*, 467 U.S. 986, 1016 (1984). Nevertheless, the "taking" of petitioners' property to provide such "damages" (far in excess of any rational computation of the harm caused by petitioners) constitutes an unconstitutional shifting of private resources.

[21] The *only* legitimate state purpose at issue is the provision of a damage award that will fully *compensate* for the damages suffered. Other potential state interests, such as punishment, deterrence or restitution of environmental conditions, are furthered through other means, such as an award of punitive damages (pun-

v. *United States*, 148 U.S. 312, 325 (1893) (Takings Clause "prevents the public from loading upon one individual more than his just share of the burdens of government"). In addition, because there is no "rational basis" for the state law damage rules (as applied by the courts below), the imposition of the excessive damages upon petitioners for conduct long since abated (and, in fact, positively remediated) also violates the guarantee of Due Process.

Unquestionably, the decision below will have a long-lasting and detrimental impact that extends far beyond this petition. The decision will create significant uncertainty in areas of this country where historical mining or manufacturing techniques (no longer in use) may give rise to a threat of open-ended damage awards for contamination of water or land which primarily occurred in decades gone by. While compensation for injury to property certainly should be available, even up to the total fair market value of that property, the recovery permitted by the courts below is grossly excessive and therefore this court should grant certiorari and consider the important and fundamental questions of federal law presented in this case.

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ishment or deterrence) or through state environmental law (restitution). *See* Kan. Stat. Ann. § 65-170d (Kansas environmental law providing specific range of penalties).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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January 18, 1989

88-1186

No. ———

Supreme Court, U.S.
FILED
JAN 18 1989
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

GENERAL HOST CORPORATION and CUDAHY COMPANY,
Petitioners,

v.

CECIL W. MILLER, *et al.*,
Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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APPENDIX A

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

Nos. 87-1502
87-2283

CECIL W. MILLER and MILDRED E. MILLER, Joint Tenants; MARGARET L. BIRCHENOUGH TESTAMENTARY TRUST, DONALD L. BIRCHENOUGH, ANSEL TOBIAS and WALTER WRIGHT, Trustees; RUTH M. HOLLINGER, Individually and as Joint Tenant with DELBERT HOLLINGER; JOHN E. EDWARDS and KERMIT C. EDWARDS, Joint Tenants; HOMER SHARPE; CECIL M. TOBIAS and FRANCES TOBIAS, Joint Tenants; PAUL F. WESTRUP and ARDIS B. WESTRUP, Joint Tenants; JAY BROTHERS; LYLE BROTHERS, Individually and as Joint Tenant with PATRICIA R. BROTHERS; ALVIN ENGELLAND; ANSEL ENGELLAND; JACK ENGELLAND and VIVIAN M. ENGELLAND, Joint Tenants; GERALD N. JONES and DONNA JONES, Joint Tenants; ROBERT A. JOHANNSEN; RAYMOND E. TOBIAS; GARY ZWICK; LESTER COLLE; HARVEY WILLHAUS and MARILYLN WILLHAUS, Joint Tenants; WILMOR H. ODEN; RAPHAEL ROEDER and ANNABELLE A. ROEDER, Joint Tenants; EDRIS EDWARDS; EDWARD F. JANDA and ANNA MAE JANDA, Joint Tenants; HARRY ZWICK; ARTHUR H. ODEN; JOLEEN J. OTTLINGER; and WILLIAM L. BEMIS and DOROTHY BEMIS, Joint Tenants,

Plaintiffs-Appellees,

v.

CUDAHY COMPANY, a Delaware Corporation, and GENERAL HOST CORPORATION, a New York Corporation,

Defendants-Appellants.

Appeal from the United States District Court
for the District of Kansas
(D.C. No. 77-1212)

[Filed Sept. 28, 1988]

John Logan O'Donnell (Thomas D. Kitch and Ron Campbell, Fleason, Gooing, Coulson & Kitch, Wichita, Kansas, and E. Sherrell Andrews and Michael L. Spafford with him on the brief), Olwine, Connelly, Chase, O'Donnell & Weyher, New York, New York, for Defendants-Appellants.

H. Lee Turner (Deborah Turner Carney, Golden, Colorado, and Casey R. Law and Lisa A. Beran with him on the brief), Turner and Boisseau, Chartered, Great Bend, Kansas, for Plaintiffs-Appellees.

Before LOGAN, BARRETT and BALDOCK, Circuit Judges.

BALDOCK, Circuit Judge.

In this diversity action, plaintiffs-appellees claimed that the American Salt Company's (American Salt) salt mining operations caused the pollution of an underground aquifer passing under their farms, resulting in their inability to utilize the water in the aquifer for irrigation. At the time appellees filed their complaint, American Salt was an operating division of defendant-appellant Cudahy Company (Cudahy), which is a wholly-owned subsidiary of defendant-appellant General Host Corporation (General Host). The district court concluded that the pollution emanating from the salt plant constituted a continuing, abatable nuisance causing temporary damages and found appellants liable for $3.06 million in actual damages and $10 million in punitive damages. The court then held the punitive damages

award in abeyance and retained jurisdiction over the award pending the presentation of a remedial plan to clean the aquifer. Subsequently, the court abandoned the remedial plan, entered final judgment on the punitive damages award and assessed as costs to appellants certain post-trial expert witness fees.

In this consolidated appeal, appellants contend that 1) appellees' claims are barred by the statute of limitations, 2) the district court's method of calculating actual damages was erroneous as a matter of Kansas law, 3) the court erred in awarding punitive damages, 4) General Host cannot be held liable in the absence of evidence that Cudahy was its *alter ego*, and 5) the court erred in assessing post trial expert witness fees in excess of the statutory limit. We affirm in part and reverse in part.

The complex historical and factual background surrounding this litigation has been exhaustively detailed by the district court. *See Miller v. Cudahy Co.*, 567 F. Supp. 892, 894-95 (D. Kan. 1983) (*Miller I*); *Miller v. Cudahy Co.*, 592 F. Supp. 976, 981-1003 (D. Kan. 1984) (*Miller II*). As a consequence, we will provide only a brief overview of the factual setting. We note at the outset that we have carefully reviewed the voluminous trial transcript in its entirety and conclude that the district court's comprehensive factual findings, *Miller II*, 592 F. Supp. at 981-1003, are amply supported by the record.

Appellees are owners and lessees of real property located in Rice County, Kansas. The land is used primarily for agricultural production. American Salt, along with its predecessor, has operated a salt manufacturing plant near Lyons, Kansas since 1908.

Located two miles south of Lyons is Cow Creek, which flows in a southeasterly direction and is a minor tribu-

tary of the Arkansas River. Below Cow Creek is the Cow Creek Valley Aquifer (the aquifer), an underground fresh-water stratum which occupies a width of one to two miles and lies at depths of between approximately ten and seventy feet. The acquifer also flows in a southeasterly direction, at a rate of between one-and-a-half and five feet per day. The water in the aquifer passes under the land owned or leased by appellees after it has passed under American Salt's brine fields and plant.

Salt concentrations of over 30,000 parts per million have been recorded in water samples drawn from the aquifer. Concentrations of 250 parts per million are sufficient to render water unfit for domestic or irrigation use. As found by the district court, the salt present in the aquifer escaped from the property and control of American Salt. The majority of the salt escaped through subsurface leaks, while the remainder percolated downward from surface spills.

Due to insufficient rainfall, farmers in Rice County are unable to grow corn without irrigating their land. Appellees alleged that because of the salt pollution of the aquifer, they are unable to irrigate and therefore can grow only dryland crops such as wheat and milo, which do not produce the revenues generated by corn crops.

The district court, in commenting on the more than half-century of disputes between American Salt and area farmers, described the historical background of this case as "Dickensian" in nature. *Miller v. Cudahy Co.*, 656 F. Supp. 316, 319 (D. Kan. 1987) (*Miller III*). Final resolution of this lawsuit itself required nearly a decade. On May 31, 1977, appellees filed their complaint seeking injunctive relief and actual and punitive damages. Following a protracted discovery period, the final pretrial order was filed on March 9, 1982.

The district court denied appellants' motion for summary judgment,[1] which was predicated on their contention that appellees' claims were barred by the statute of limitations. The court concluded that appellees' showing was sufficient to categorize the American Salt operation as a continuing, abatable nuisance causing temporary damages and giving rise to a continuing series of causes of action. *Miller I*, 567 F. Supp. at 906-08. The court also concluded that the two-year statute of limitations did operate to preclude appellees from recovering for injuries sustained more than two years prior to the filing of their complaint. *Id.* at 909. The court stated that appellees were entitled to attempt to prove and recover their damages accruing between a date two years before the complaint was filed (May 31, 1975) and the date of judgment. *Id.* at 909.

Following a bench trial, the court found appellants liable for temporary damages to annual crops and awarded appellees $3.06 million in actual damages for the period of 1975 through 1983.[2] *Miller II*, 592 F. Supp. at 1005. The court arrived at the amount of lost crop profits by calculating the difference between the net value of corn crops and the net value of the wheat and milo crops which were actually grown. *Id.* at 990-92. The court also awarded $10 million in punitive damages; however, it retained jurisdiction over the award and held final judgment in abeyance, pending appellants' "good-

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[1] The court did enter summary judgment against several plaintiffs whose land was either completely outside the boundaries of the aquifer or had not yet been affected by the salt pollution of the aquifer. *Miller I*, 567 F. Supp. at 897-98.

[2] The district court also concluded that appellants were liable to several individual plaintiffs for the following actual damages: approximately $8,000 for brine trespasses; nominal damages of $1 for pipeline trespass; consequential damages of $7,000 for damage to three domestic water wells; and consequential damages of $42,500 for damage to a dairy operation. *Miller II*, 592 F. Supp. at 1005-06.

faith efforts to define and remedy the pollution they have caused." *Id.* at 1007-08. Pursuant to Fed. R. Civ. P. 54(b), the court entered final judgment on the issues of liability and actual damages. *Id.* at 1008-09. Appellants filed a timely notice of appeal, but this court dismissed their appeal as premature. *Miller v. Cudahy Co.*, No. 85-1450, slip op. at 6 (10th Cir. Jan. 31, 1986).

Three years later, the district court rejected a court-ordered cleanup plan, because no feasible plan had been presented, and declined to remit any of the punitive damages award. *Miller III*, 656 F. Supp. at 356-57. The court also denied as untimely appellant General Host's motion to dismiss, in which General Host had argued that the court had incorrectly applied the doctrine of piercing the corporate veil in finding General Host liable for the salt pollution of the aquifer. *Id.* at 322-24. Finally, the court taxed as costs to appellants the expert witness fees of appellees' trial expert for his participation in the post-trial remedial action phase. *Id.* at 339.

I.

Appellants first argue that appellees' claims are time-barred, the primary thrust of their argument being that the injuries suffered by appellees are permanent in nature and were ascertained long before the statute of limitations began to run. They additionally assert that they should not be equitably estopped from raising the statute of limitations defense.

The applicable Kansas statute of limitations, Kan. Stat. Ann. § 60-513 (1983), provides in pertinent part:

> (a) The following actions shall be brought within two (2) years: (1) An action for trespass upon real property.
>
> . . .
>
> (4) An action for injury to the rights of another, not arising on contract, and not herein enumerated.

The crucial question in regard to the applicability of the two-year statute of limitations is whether the injuries sustained by appellees are permanent or temporary in nature. Drawing a distinction between permanent and temporary damages resulting from a nuisance is at best problemmatical.[3] The district court, upon surveying Kansas nuisance law from 1876 to the present, noted that the relevant cases addressing the distinction between permanent and temporary injuries are somewhat unclear and inconsistent. *Miller I*, 567 F. Supp. at 899.

The Kansas Supreme Court likewise has recognized the rather confused state of the law concerning the distinction between permanent and temporary nuisances. *See, e.g., Gowing v. McCandless*, 547 P.2d 338, 342 (Kan. 1976); *Henderson v. Talbott*, 266 P.2d 273, 278 (Kan. 1954). The supreme court recently indicated that the distinction between temporary and permanent damages remains a viable concept, however, while emphasizing that "no hard and fast rule can be adopted as to when the damages are deemed permanent and when they are deemed temporary." *Olson v. State Highway Comm'n of Kan.*, 679 P.2d 167, 172 (Kan. 1984). Noting that some cases refer not only to the permanent or temporary nature of the damages, but also to the permanent or temporary nature of the causative factor, the court stressed that "[e]ach case must be considered in its own factual setting." *Id.*

In light of its examination of the pertinent Kansas nuisance cases, the district court was convinced "that the

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[3] As described in one torts treatise, "[t]here is perhaps no more impenetrable jungle in the entire law than that which surrounds the word 'nuisance.'" W. Keeton, D. Dobbs, R. Keeton & D. Owen, Prosser and Keeton on Torts 616 (5th ed. 1984). In regard to the specific issue presented here, another treatise notes the general confusion surrounding the distinction the courts have drawn between permanent and temporary nuisances. F. Harper, F. James & O. Gray, The Law of Torts § 1.30 (2d ed. 1986).

Kansas Supreme Court, if presented with [appellant's] statute of limitations argument, would find that argument unpersuasive." *Miller I*, 567 F. Supp. at 906. Our reading of those cases comports with the district court's, and we conclude that the salt pollution resulting from American Salt's operations constitutes a continuing nuisance causing temporary damages.

Under Kansas law, the plaintiff has the option of suing for either permanent or temporary damages.[4] *See Augustine v. Hinnen*, 443 P.2d 354, 355-56 (Kan. 1968). If permanent damages are sought, an action claiming such damages must be brought within two years. *Gowing v. McCandless*, 547 P.2d at 343. "Permanent damages are given on the theory that the cause of injury is fixed and that the property will always remain subject to that injury." *McAlister v. Atlantic Richfield Co.*, 662 P.2d 1203, 1211 (Kan. 1983). They "are damages for the entire injury done—past, present and prospective—and generally speaking [are] those which are practically irremediable." *Id.*

If the injury or wrong is classified as temporary, the limitation period starts to run only when the plaintiff's land or crops are actually harmed, and for purposes of the statute of limitations, each injury causes a new cause of action to accrue, at least until the injury becomes permanent. *Williams v. Amoco Production Co.*, 734 P.2d 1113, 1119 (Kan. 1987); *Gowing v. McCandless*, 547

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[4] In support of their argument that the salt pollution constitutes a permanent nuisance, appellants contend that appellees' original complaint was pled in terms of permanent damages. That contention is without merit. The final pretrial order describes the contentions and issues in terms of continuing nuisance and trespass. Rec. vol. I, doc. 309 at 4; *see Miller I*, 567 F. Supp. at 907-08. Further, the Kansas Supreme Court has indicated that an allegation of permanent damages would include allegations of temporary damages. *Kiser v. Phillips Pipe Line Co.*, 41 P.2d 1010, 1011 (Kan. 1935).

P.2d at 342; *see generally* F. Harper, F. James & O. Gray, The Law of Torts § 1.30 (2d ed. 1986). This rule is especially applicable if the situation involves elements of uncertainty, "such as the possibility or likelihood of the alteration or abatement of the causative condition." *Gowing v. McCandless*, 547 P.2d at 342. The rule is predicated upon the defendant's ability and duty to abate the existing conditions which constitute the nuisance. *Id.* at 343; *accord McAlister v. Atlantic Richfield Co.*, 662 P.2d at 1211 (stating that temporary damages "are awarded on the theory that cause of the injury may and will be termirated").

Appellants rely primarily on *McAlister v. Atlantic Richfield Co.* in arguing that the damages caused by their admitted pollution of the aquifer will last indefinitely (at least 200 years) and therefore are permanent for purposes of the statute of limitations.[5] In *McAlister*, the plaintiff sued for temporary damage to his water well caused by the defendant's oil fields. The plaintiff alleged "that not less than 150 nor more than 400 years will pass before the well water will be once again fit for drinking." *McAlister v. Atlantic Richfield Co.*, 662 P.2d at 1212. Under the circumstances of that case, in which

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[5] Appellants further rely on *Atkinson v. Herington Cattle Co.*, 436 P.2d 816 (Kan. 1968), in which the plaintiff brought suit within two years of discovering nitrate pollution in a well which supplied water for his dairy farm. The nitrates had emanated from the defendants' feedlot operation. The Kansas Supreme Court affirmed the trial court's conclusion that proof that damage to real property will remain "for an indefinite time" will sustain a judgment for permanent damages. *Id.* at 820, 824.

Atkinson is distinguishable. The issue was framed in terms of sufficient evidence to sustain the trial court's award of actual damages, and did not involve any discussion of the elusive permanent-temporary distinction. Moreover, as discussed above, appellants' reliance on the allegedly permanent nature of the *injury* overlooks the nature of the causative factor, i.e., American Salt's operation, which must also be factored into the analysis of whether damages resulting from a nuisance are permanent or temporary.

there was no indication that the pollution was abatable and the relevant defendants had discontinued oil well operations in the 1940's, the Kansas Supreme Court held that portion of the claim to be barred by the two-year statute of limitations because the injury was "fixed" and "the property will always remain subject to that injury." *Id.* at 1211-12.

Pointing to information generated during the post-trial remedial phase, which purportedly indicates that any cleanup of the aquifer will take as long as 200 years, appellants contend that *McAlister* is controlling in that the injuries to appellees' farms are fixed and cannot be remedied within a reasonable time.[6] Initially, we agree with appellees that appellants cannot rely on post-trial "evidence," in particular the data contained in their own reports, to bolster their argument on appeal that the injuries are permanent for purposes of the running of the statute of limitations. This court will consider only that evidence adduced at trial. It should be noted that appellants filed a motion for a new trial, based in part on their post-trial testing of the aquifer which purportedly indicated that any cleansing of the aquifer would take significantly longer than had been indicated previously. The district court denied the motion, *Miller III*, 656 F. Supp. at 334, and appellants do not appeal that ruling.

The trial evidence indicates that the damage to the aquifer is remediable if the salt pollution is abated.

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[6] Appellants also cite to the district court's statement, made upon concluding that a court-ordered cleanup plan was not feasible, that "the pollution is still not remediable *within a reasonable time*," *Miller III*, 656 F. Supp. at 357 (emphasis in original). Taken in context, the court's statement was made in reference to the untenable nature of a court-supervised remedial plan, *see id.* at 351-57, and in any event is certainly not conclusive as a refutation of the *trial* evidence regarding the time frame for cleansing the salt pollution from the aquifer.

While it is true that no conclusive time frame for the cleansing of the aquifer has been established, it is apparent to this court that, contrary to appellants' contention, the cleanup process can be accelerated by intervention measures and can be achieved within a reasonable time. Further, appellants' argument focusing solely on the nature of the injuries resulting from the salt pollution of the aquifer disregards the fact that we must also look at the nature of the causative factor of the pollution.[7] *Olson v. State Highway Comm'n of Kan.*, 679 P.2d at 172. Appellants do not contend that there is no "possibility or likelihood" that the causative condition, namely American Salt's mining operations, can be altered or abated. *Gowing v. McCandless*, 547 P.2d at 342. The record indicates that the cause of the injuries can be terminated, and indeed appellants state that they have already undertaken measures to do so. *See* Brief for Defendants-Appellants at 35. Nor do appellants argue that they have no duty to abate the existing conditions which constitute the nuisance. *See Gowing v. McCandless*,

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[7] In pointing out the inconsistent use of the terms "temporary" and "permanent" in the Kansas cases, the district court noted

> that, when realty is damaged by pollution, the terms 'temporary' and 'permanent' can be applied to three quite distinct facets of the situation. First, the *pollution itself*, or the causal chemistry of the injury to the land, may be either temporary or permanent. Second, the *damage or loss* caused by the injury may be temporary or permanent. Last, the *source or origin of the pollution*, be it a sewage plant, an oil well, or a salt mine, may be temporary or permanent. The possibilities for inconsistencies are, of course, multiplied when different labels are applied to these facets, such as, for example, calling the source of the pollution a nuisance and then characterizing the nuisance as temporary or permanent.

Miller I, 567 F. Supp. at 899-900 (emphasis in original). The district court's analysis is helpful to our determination of the legal nature of the nuisance and serves to reinforce our interpretation of the Kansas nuisance cases, namely that appellants' argument is deficient by virtue of focusing solely on the nature of the injuries resulting from the salt pollution of the aquifer.

547 P.2d at 343; *McAlister v. Atlantic Richfield Co.*, 662 P.2d at 1211. The conclusion that the damages are temporary is bolstered by the evidence that the salt pollution actually continued during the course of this litigation, further indicating the existence of a continuing nuisance. *See Miller II*, 592 F. Supp. at 990.

The damage to the aquifer is remediable and the cause of the damage is abatable. Upon considering all the facts and circumstances, including the nature of the pollution and the nature of the causative factor, as well as the continuing pollution of the aquifer, we conclude, as did the district court, that American Salt's operation constitutes a continuing nuisance causing temporary damages.

Having rejected appellants' assertion that the damages resulting from their pollution of the aquifer are permanent for statute of limitations purposes, we also reject their claim that *all* of appellees' claims are time-barred. The fact that salt pollution has existed in the aquifer for many years does not negate the district court's limitation of appellees' recovery to temporary damages. By limiting their potential recovery to those damages incurred not more than two years prior to the filing of their complaint, the court implicitly determined that the two-year statute of limitations precluded any claims for permanent damages.

Finally, appellants contend that they should not be equitably estopped from asserting that appellees' claims are time-barred. The district court concluded that the statute of limitations should be equitably tolled and that the appellants should be equitably estopped from relying on the statute of limitations defense.[8] *Miller II*, 592

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[8] The court's Conclusion of Law No. 38 states:

> The Court concludes that, in the event the statute of limitations is deemed to apply to the claims of the plaintiffs in this case in such a way as to completely bar those claims, the facts

F. Supp. at 1008. Our resolution of the statute of limitations question obviates the need to address this issue.

II.

Arguing that the district court's method of calculating actual damages was erroneous as a matter of law, appellants assert that the amount of temporary damages awarded cannot exceed the potential recovery for permanent damages. They alternatively contend that, assuming the propriety of an award of temporary damages, the proper measure of such damages is the reduced rental value of appellees' land.

The district court's calculation of the amount of actual damages is reviewed under the clearly erroneous standard. Fed. R. Civ. P. 52(a). We are not constrained by the clearly erroneous standard, however, if the court's computation of damages is predicated upon a misconception of the governing rule of law. *Chaparral Resources, Inc. v. Monsanto Co.*, 849 F.2d 1286, 1289 (10th Cir. 1988) (addressing proper legal standard for damages resulting from the wrongful repudiation of a contract).

The temporary-permanent distinction which is determinative in regard to the running of the statute of limitations is also relevant to the question of the proper measure of damages resulting from an actionable nuisance. *See McAlister v. Atlantic Richfield Co.*, 662 P.2d at 1211; F. Harper, F. James & O. Gray, The Law of Torts at § 1.30. In Kansas, the measure of damages for permanent injury to real property is the difference in the fair market value of the land before and after the injury. *Williams v. Amoco Production Co.*, 734 P.2d at

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and circumstances shown by the evidence clearly demonstrate that the statute of limitations should be equitably tolled and that the defendants should be equitably estopped from relying on the statute of limitations defense. *See, e.g., Newton v. Hornblower, Inc.*, 224 Kan. 506, 516, 582 P.2d 1136 (1978).

Miller II, 592 F. Supp. at 1008.

1120; *Kiser v. Phillips Pipe Line Co.*, 41 P.2d 1010, 1011-12 (Kan. 1935). Diminished fair market value is not used as the measure of recovery, however, if an injury to real property is temporary in nature. Temporary damages represent the reasonable cost of repairing the property, "which may include the value of the use thereof during the period covered by the suit, or it may be the diminution in the rental value of the property, together with such special damages to crops, improvements, etc." *Kiser v. Phillips Pipe Line Co.*, 41 P.2d at 1012; *accord Alexander v. Arkansas City*, 396 P.2d 311, 315 (Kan. 1964).

Appellants' assertion that temporary damages may not exceed the value of the property injured, or essentially that there must be a "cap" on an award of temporary damages, is unsupported by pertinent Kansas authority. Their alternative contention, that the sole measure of such damages is reduced rental value, is likewise unsupported. While reduced rental value of the property injured is indeed one measure of temporary damages, the value of the *use* of the property is also a proper measure of damages. The Kansas Supreme Court has treated the value of the use of property and the diminution of rental value as separate and distinct bases for awarding temporary damages. *See Alexander v. Arkansas City*, 396 P.2d at 315; *Kiser v. Phillips Pipeline Co.*, 41 P.2d at 1012; *see also* D. Dobbs, Remedies § 5.3 (1973) (noting difference between rental value and use value).

The district court found that because irrigated corn crops would be more profitable than the dryland crops appellees were forced to grow because of the salt pollution of the aquifer, appellees "have been damaged by the pollution to the extent of these lost crop profits." *Miller II*, 592 F. Supp. at 991. In so finding, the court applied the proper legal standard under Kansas law for measuring temporary damages. *See Kiser v. Phillips Pipe Line Co.*, 41 P.2d at 1012. The court's calculation of actual

damages, made upon consideration of the similar formulas presented by the various expert witnesses, was based upon the difference between the net value of the lost corn production and the net value of the wheat and milo crops actually grown. *Miller II*, 592 F. Supp. at 991-92. That calculation is supported by the evidence and is not clearly erroneous.

III.

Appellants next contend that the $10 million punitive damages award is not supported by the evidence. They further contend that the district court abused its discretion by refusing to eliminate or substantially reduce the "contingent" award at the close of the post-trial remedial phase and that the Kansas law of punitive damages is unconstitutional as applied to the facts of this case.

A.

The issue of whether there is sufficient evidence to justify an award of punitive damages is a question of law. *Alley v. Cubser Development Co.*, 785 F.2d 849, 855 (10th Cir.), *cert. denied*, 107 S. Ct. 457 (1986) (applying Colorado exemplary damages statute). In a diversity case, the circumstances under which punitive damages are available are governed by state law, as are the substantive elements upon which such an award may be based. *O'Gilvie v. International Playtex, Inc.*, 821 F.2d 1438, 1448 (10th Cir. 1987), *cert. denied*, 108 S. Ct. 2014 (1988) (addressing remittitur of punitive damages award). "Thus, an assessment of the propriety of awarding punitive damages and the sufficiency of the evidence to support the award must necessarily be made by reference to the factors that the state has deemed relevant in determining whether punitive damages are appropriate." *Id.*

Under Kansas law, punitive damages may be imposed for a willful and wanton invasion of an injured party's

rights, the purpose being to restrain and deter others from committing like wrongs. *Id.* at 1446; *Wooderson v. Ortho Pharmaceutical Corp.*, 681 P.2d 1038, 1061 (Kan.), *cert. denied*, 469 U.S. 965 (1984). "Wantonness is characterized by a realization of the imminence of damage to others and a restraint from doing what is necessary to prevent the damage because of indifference as to whether it occurs." [9] *Boehm v. Fox*, 473 F.2d 445, 447 (10th Cir. 1973). A punitive damages award "must be viewed in light of the actual damages sustained, the actual damage award, the circumstances of the case, the evidence presented, the relative positions of the plaintiff and the defendant, and the defendant's financial worth." *Wooderson v. Ortho Pharmaceutical Corp.*, 681 P.2d at 1064.

In the instant case, the award of punitive damages is clearly supported by the evidence, in particular the testimony of three former American Salt employees. It is readily apparent that appellants created the nuisance and "persistently maintain[ed] it with a reckless disregard for the rights of others." *Newman v. Nelson*, 350 F.2d 602, 604-05 (10th Cir. 1965). Appellants' conduct was deliberate, with full knowledge of the consequences and with a marked indifference thereto.

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[9] In *Newman v. Nelson*, 350 F.2d 602 (10th Cir. 1965), a diversity case in which the jury awarded actual and punitive damages for the pollution of the plaintiff's stock pond by crude oil escaping from the defendant's oil lease operations, this court noted that there was "no reason to doubt that Kansas courts would embrace the nuisance theory for punitive damages." *Id.* at 604. As explained by Chief Judge Murrah, "to be liable for actual damages one need only create or commit a nuisance, *but to be punished for it he must create and persistently maintain it with a reckless disregard for the rights of others.*" *Id.* at 604-05 (emphasis added). Based on that legal premise, the panel concluded that "the proof falls far short of showing an indifferent maintenance of a nuisance" and reversed the judgment as to punitive damages. *Id.* at 605-06.

B.

Contending that the district court abused its discretion by refusing to remit the punitive damages award at the close of the post-trial remedial phase, appellants characterize the court's award as "contingent." That characterization is premised on the court's retention of jurisdiction over the award "to evaluate a potential cleanup to be implemented in lieu of some or all of the punitive damages award." *Miller III*, 656 F. Supp. at 324. The court stated that, because appellants' post-trial conduct would be "extremely relevant" to their "state of mind" at the time of the occurrences, punitive damages would be eliminated or substantially reduced if the defendants undertook a "conscientious, good-faith, and realistic effort to address and remedy, within a reasonable time, the pollution presently existing in the aquifer." *Miller II*, 592 F. Supp. at 1007-08. Appellants now argue that their post-trial conduct "is further proof of their good intent" and that the court abused its discretion by belatedly imposing new conditions for establishing good intent.

Federal law governs the decision whether a remittitur should be granted, the decision being tested on appellate review by an abuse of discretion standard. *K-B Trucking Co. v. Riss Int'l Corp.*, 763 F.2d 1148, 1162 (10th Cir. 1985). In *O'Gilvie*, which was handed down some three months after the district court's final opinion, this court held that a trial court is without authority under either state or federal law to reduce a punitive damages award on the basis of post-trial conduct.[10] *O'Gilvie v. Interna-*

[10] In *O'Gilvie*, the plaintiff alleged that his wife's use of the defendant's super-absorbent tampons caused her death from toxic shock syndrome. The jury awarded the plaintiff $10 million in punitive damages. Upon the defendant's post-trial representation that it was discontinuing the sale of some of its products, instituting a program of alerting the public to the dangers of toxic shock syndrome and modifying its product warning, the district court

tional Playtex, Inc., 821 F.2d at 1449-50. Thus the district court would have been without discretion to reduce or eliminate the punitive damages on the basis of events occurring after the trial.[11] *See id.* at 1449. While the district court did not have the benefit of this court's opinion in *O'Gilvie* upon entering final judgment on the punitive damages award, any reduction, or elimination, of the award would have been highly questionable, given our perception that there is no relationship between appellants' post-trial conduct and their state of mind at the time of the tortious acts. Even assuming that appellants' post-trial conduct was relevant, and that the district court had the power to remit the punitive damages award on the basis of that conduct, we would be unable to find the court would have abused its discretion in not doing so. *See Miller III*, 656 F. Supp. at 354-356 (discussing appellants' lack of good faith in the post-trial remedial phase).

Regarding the court's retention of jurisdiction over the punitive damages award, this case points up some

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ordered the punitive damage award reduced to $1,350,000. *O'Gilvie v. International Playtex, Inc.*, 821 F.2d at 1440-41. After reviewing the bases for remitting a punitive damage award, this court concluded

> that because the post-trial conduct upon which the trial court relied in ordering remittitur in this case had no relevance to the injurious conduct underlying the claim for punitive damages, the court was without authority under either state or federal law to reduce the award on that basis. In addition, we are compelled to point out that the court's order subverts the goals of punishment and deterrence that underlie the assessment of punitive damages in Kansas.

Id. at 1450.

[11] The district court apparently recognized that limitation on its power to remit the punitive damages award. As stated by the court, "[a]n elementary aspect of punitive damages seems to have been forgotten in this case: they are awarded on account of *past* behavior." *Miller III*, 656 F. Supp. at 354 (emphasis in original).

of the problems inherent in trial courts using their equitable jurisdiction to attempt to oversee solutions to problems such as the cleanup of the aquifer. The court's attempt to fashion an equitable remedy which would result in the cleansing of the aquifer was well-intentioned, and we have no reason to question the court's statements that "the actions proposed went to the nature of relief [appellees] were seeking, and were consistent with the relief requested" and that the court was attempting "to fashion a remedy which truly rectified the wrong, not merely compensated for it." *Miller III*, 656 F. Supp. at 351. However, during the post-trial phase the parties addressed other matters only tangentially related to the cleanup plans, *id.*, and as the court candidly admitted, *see id.* at 342, 351-57, a court-supervised remedial program was simply not feasible.

C.

Finally, appellants assert that the Kansas law of punitive damages is unconstitutional because it places no limits on the amount of such awards. They argue that because punitive damage awards are essentially penal in nature, they mandate the procedural protection afforded by the eighth and fourteenth amendments to the United States Constitution.

Appellants have cited no persuasive federal constitutional authority to support their argument. The Kansas appellate courts have addressed similar arguments in varying contexts and have concluded that the imposition of punitive damages under Kansas law neither demands the same safeguards afforded in criminal prosecutions nor violates the due process clause. *See, e.g., Tetuan v. A.H. Robins Co.*, 738 F.2d 1210, 1245-46 (Kan. 1987); *McDermott v. Kansas Pub. Serv. Co.*, 712 P.2d 1199, 1203 (Kan. 1986); *Unified School Dist. No. 490 v. Celotex Corp.*, 629 P.2d 196, 206 (Kan. App. 1981).

IV.

Appellants next argue that the district court erred in imposing liability on General Host absent a finding of piercing the corporate veil. The crux of its argument is that the record is devoid of evidence sufficient to conclude that Cudahy is General Host's *alter ego*.

As discussed above, appellant General Host filed a motion to dismiss several years after the completion of the trial, arguing that the district court applied the wrong legal analysis in considering General Host's liability. The court denied the motion as untimely pled. *Miller III*, 656 F. Supp. at 324. Countering appellees' assertion that its piercing the corporate veil argument is not properly before this court, General Host contends that it preserved the issue by moving for a directed verdict at the close of appellees' case and by later submitting requested findings of fact and conclusions of law on that point. Brief for Defendants-Appellants (No. 87-1502) at 52 n.56. It further points to appellants' Fed. R. Civ. P. 59 motion in which it argued that it could not be held liable under any theory of liability. *Id.* We agree with appellees that this issue is not properly before us, and decline to address the merits of an issue upon which the district court did not rule and for which appellees were not compelled to produce any refuting evidence.

General Host's oral motion for a directed verdict simply stated that appellants would reserve argument and comment on appellees' evidence at the close of the case. Rec. vol. 45 at 2602-03. In its motion to amend findings and judgment or, in the alternative, for a new trial, General Host argued on several grounds that it could not be held liable for damages but did not argue that it should be dismissed as a defendant.[12] Rec. vol. 2, doc. 462 at 28-

[12] In its motion, General Host stated that for the district court to hold it "liable for damages, which were suffered by most of the plaintiffs as a result of occurrences many years prior to 1973, is

30. On appeal, General Host does not assign error to the denial of its motion to dismiss, but rather argues that the district court applied the wrong legal theory in imposing liability. It has not specified the manner in which this issue was preserved for appeal.

In considering the procedural basis on which General Host sought dismissal, the district court determined that the motion was based on Fed. R. Civ. P. 12(b)(6). *Miller III*, 656 F. Supp. at 322-23. The court noted that while General Host alluded to the theory in its answer, it did not move for dismissal at that time, did not move for dismissal on such grounds in any motion for judgment on the pleadings under Fed. R. Civ. P. 12(h)(2), and did not move for dismissal at trial. *Id.* at 323. The court concluded that a mere recital of the defense of failure to state a claim upon which relief can be granted in the answer was insufficient to preserve the issue for belated consideration. *Id.* at 324.

Appellant General Host delayed far too long in seeking dismissal claiming the *alter ego* theory did not apply. Except in cases involving subject matter jurisdiction, an appellate court is most reluctant to consider grounds raised for reversal not adequately developed by a party before or at trial. To be sure, there are exceptions, but adherence to this principle encourages a single and complete presentation of issues below and at trial. *National Advertising Co. v. City of Rolling Meadows*, 789 F.2d 571, 574 (7th Cir. 1986). It also encourages sufficient factual development of those issues presented and re-

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without precedent." Rec. vol. 2, doc. 462 at 28. The motion further states that "[i]t would be one thing to require General Host to pay for damages caused by American Salt since 1973; *it is quite another to use the events transpiring since May 31, 1975, to make General Host liable for all damages suffered by plaintiffs, regardless of when they occurred.*" *Id.* (emphasis added). That statement undercuts General Host's argument on appeal that no liability whatsoever can be imposed on it on the basis of a parent-subsidiary relationship.

spects tactical decisions made by both sides. A district court is not obligated to develop offhand references to legal terms into workable theories. *National Metalcrafters v. McNeil*, 784 F.2d 817, 825 (7th Cir. 1986). Nor must an appellate court perform this task. This case does not present extraordinary circumstances which would warrant consideration of the merits of the motion to dismiss. To the contrary, the *alter ego* issue is largely a factual one and the record is not fully developed. Moreover, the trial court's decision to hold General Host liable based on its domination of Cudahy and American Salt, *see Miller II*, 592 F.Supp. at 997-98, is supportable on factual and legal grounds. *See* H. Henn & R. Alexander, Laws of Corporations and Other Business Enterprises § 148 at 354-56 (1983) ("Where one corporation is under the domination of another, the separate corporate entities or personalities might be recognized, treating the latter as principal and the former as agent, thus making the acts of the latter in effect the acts of the former."). For these reasons, we decline to address the substance of General Host's untimely motion to dismiss.

V.

The final issue raised by appellants is whether the district court erred in awarding expert witness fees in excess of the statutory limit. They contest the court's decision to tax as costs nearly $40,000 in fees and expenses incurred by appellees' trial expert during the post-trial remedial investigation.

Absent express statutory or contractual authorization for the taxation as costs the fees of a party's expert witness, federal courts are bound by the limitations set out in 28 U.S.C. §§ 1821 and 1920. *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 107 S. Ct. 2494, 2498-99 (1987); *Chaparral Resources, Inc. v. Monsanto Co.*, 849 F.2d at 1292. A party's expert witness fees are recoverable only up to the $30-per-day statutory limit applicable to any witness. *Chaparral Resources, Inc. v. Monsanto Co.*, 849

F.2d at 1292, *Furr v. AT & T Technologies, Inc.*, 824 F.2d 1537, 1550 (10th Cir. 1987).

The district court found that certain fees and expenses of Dr. Dan Raviv, a geohydrologist and appellees' trial expert, were properly taxable to appellants. *Miller III*, 556 F. Supp. at 339. These fees and expenses were incurred in connection with the post-trial remedial action phase of the case. *Id.* Initially citing to a number of pre-*Crawford* cases which indicated that such an award would be a justifiable exercise of its equitable discretion, *id.* at 337-39, the court found that such a basis for the taxation of Dr. Raviv's fees was unnecessary. *Id.* at 339. Rather, the court stated that because its initial opinion *required* appellants to consult an expert designated by appellees during the remedial phase, "[i]t should come as no surprise now that [appellants] are responsible to pay for the expert consultations which they received." *Id.*

As we interpret the district court's reasoning, Dr. Raviv's fees were assessed as costs because the court had ordered the development of a remedial plan, thus making Dr. Raviv a "quasi" court-appointed expert. Indeed, the court did order appellants to consult with an expert chosen by appellees in formulating a remedial action plan. *Miller II*, 592 F. Supp. at 1007, 1009. While the court's logic is easily followed, the record indicates that the court refused to appoint an expert witness to assist in the formulation of a remedial plan.[13] *See, e.g.*,

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[13] In *Miller III*, the district court explained that in denying appellees' motion for a court-appointed expert, what it declined to do was to select an additional independent expert. *Miller III*, 656 F. Supp. at 338. The court stated that

> [t]he expert designated by the plaintiffs [appellees], Dr. Raviv, was involved in the remedial action phase by specific order of this Court, and his involvement was not affected by the Court's later order. In this context, it is apparent that Dr. Raviv was not only a court appointed expert, but he was no

Rec. vol. 3, doc. 624 at 1. Although the court could have properly taxed Dr. Raviv's fees had he been appointed by the court, *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 107 S. Ct. at 2498, Dr. Raviv was not so appointed. While we are cognizant of the unusual circumstances presented by the court's retention of jurisdiction pending the presentation of a viable cleanup plan, this case does not come within any of the exceptions to the established rule that expert witness fees are assessable only up to the statutory limit. Nor could the court have assessed the fees as an exercise of its equitable discretion under Fed. R. Civ. P. 54(d). That discretion is constrained by the fee statutes. *Id.* at 2499; *Chaparral*, 849 F.2d at 1292. We conclude that the district court erred in awarding the post-trial expert witness fees of Dr. Raviv.

We affirm the district court's judgment in its entirety with the exception of the assessment of the post-trial expert witness fees of Dr. Raviv. We reverse the award of the expert witness fees and remand for recalculation of costs in compliance with 28 U.S.C. §§ 1821 and 1920.

AFFIRMED IN PART and REVERSED IN PART and REMANDED.

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longer 'plaintiffs' expert.' Defendants were required by this Court to work with him in developing their plan.

Id. The court then concluded that Dr. Raviv was in actuality *appellant's* expert. "Therefore, as Dr. Raviv was in reality 'defendants' expert' for the purpose of the remedial action phase of this case—that is, he was an expert defendants were required to and did consult in their plan development—it is not only equitable to require them to pay his fees, but it is to be expected." *Id.* at 338-39.

We cannot agree that Dr. Raviv was a court-appointed expert. As discussed above, he was merely working on the court-ordered remedial plan. If Dr. Raviv was appellants' expert, then we have the rather anomalous situation of the court ordering a party to pay its own expert witness fees. We agree with appellants that such is a mischaracterization based on Dr. Raviv's use by the appellees. *See* Brief for Defendant-Appellants (No. 87-2283) at 15-20.

APPENDIX B

UNITED STATES DISTRICT COURT
D. KANSAS

Civ. A. No. 77-1212

CECIL W. MILLER and MILDRED E. MILLER, Joint Tenants; MARGARET L. BIRCHENOUGH, Testamentary Trust, DONALD L. BIRCHENOUGH, ANSEL TOBIAS and WALTER WRIGHT, Trustees; RUTH M. HOLLINGER, Individually and as Joint Tenant with DELBERT HOLLINGER; JOHN E. EDWARDS and KERMIT C. EDWARDS, Joint Tenants; HOMER SHARPE; CECIL M. TOBIAS and FRANCES TOBIAS, Joint Tenants; PAUL F. WESTRUP and ARDIS B. WESTRUP, Joint Tenants; JAY BROTHERS; LYLE BROTHERS, Individually and as Joint Tenant with PATRICIA R. BROTHERS; ALVIN ENGELLAND; ANSEL ENGELLAND; JACK ENGELLAND and VIVIAN M. ENGELLAND, Joint Tenants; GERALD M. JONES and DONNA JONES, Joint Tenants; ROBERT A. JOHANNSEN; RAYMOND E. TOBIAS; GARY ZWICK; LESTER COLLE; HARVEY WILLHAUS and MARILYN WILLHAUS, Joint Tenants; EDRIS EDWARDS; EDWARD F. JANDA and ANNA MAE JANDA, Joint Tenants; HARRY ZWICK; ARTHUR H. ODEN; JOLENE J. OTTLINGER; and WILLIAM L. BEMIS and DOROTHY BEMIS, Joint Tenants,

Plaintiffs,

v.

CUDAHY COMPANY, a Delaware Corporation, and GENERAL HOST CORPORATION, a New York Corporation,

Defendants.

March 3, 1987

Turner & Boisseau Chartered, Great Bend, Kan., Deborah Carney, Golden, Colo., for plaintiffs.

Ron Campbell, Thomas D. Kitch of Fleeson, Gooing, Coulson & Kitch, Wichita, Kan., for defendants.

OPINION AND ORDER

THEIS, District Judge.

> Jarndyce and Jarndyce drones on. This scarecrow of a suit has, in course of time, become so complicated that no man alive knows what it means. The parties to it understand it least; but it has been observed that no two Chancery lawyers can talk about it for five minutes without coming to a total disagreement as to all the premises. Innumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it. Scores of persons have deliriously found themselves made parties in Jarndyce and Jarndyce, without knowing how or why; whole families have inherited legendary hatreds with the suit. The little plaintiff or defendant, who was promised a new rocking-horse when Jarndyce and Jarndyce should be settled, has grown up, possessed himself of a real horse, and trotted away into the other world. Fair wards of court have faded into mothers and grandmothers; a long procession of Chancellors has come in and gone out; the legion of bills in the suit have been transformed into mere bills of mortality; there are not three Jarndyces left upon the earth perhaps, since old Tom Jarndyce in despair blew his brains out at a coffee-house and Jarndyce still drags its dreary length before the Court, perenially hopeless.
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> C. Dickens, *Bleak House.*

I. HISTORY OF THE LITIGATION

In 1908, the predecessor of American Salt began a salt production operation southeast of Lyons, Rice County Kansas. Salt production has continued at that location continuously since. Also beginning in 1908, commensurate with the salt production, highly concentrated brine began running "off conveyor belts, elevator buckets and through slats in drying room floors. It ponds on the surface at the southeast corner of the plant. This brine also runs off the property along the Frisco railroad to the county road east of the plant." Defendants' Trial Exhibit A. This, too, has apparently continued in varying degrees and fashions ever since. By as early as 1927, a neighboring landowner began finding his underground water supply contaminated with chlorides from the brine, and was forced to haul domestic water to his house.

The pollution continued. The Kansas Board of Heatlh became involved in 1933. In the next year, neighboring farmers hired an attorney who protested to the American Salt plant concerning the injury from the salt runoff, and demanded damages. The salt company demurred, claiming that the pollution was not solely its fault, and detailed to the farmers the plant's new pollution control improvements that would cure any pollution problems then in existence. The year was 1935.

The pollution continued. Complaints continued. More state investigations were conducted. The salt plant, in conjunction with the state Board of Health, continued to make "antipollution improvements." The farmers bore children, raised them to adulthood, and died. Their children took over the farming operations. Land was sold, or inherited by new generations. General Host Corporation acquired Cudahy Company, including its American Salt Division. The Board of Health's responsibilities for this problem were assumed by the Kansas Department of Health and Environment [KDHE]. Irrigation plans

were abandoned. Suits were threatened. The pollution continued.

This Dickensian matter was brought to this Court when a complaint was filed on May 31, 1977. Discovery proceeded in a most unusual and contentious manner, and a pretrial order was finally filed on March 9, 1982. Defendants then filed an extremely lengthy motion for partial summary judgment on November 2, 1982, the general thrust of which was that the suit was barred by the statute of limitations. Defendants argued that since they had been polluting the underground aquifer for so long it was no longer actionable: they had in essence acquired a license to pollute based on long-standing habit. After being deluged with heavy briefing by both sides, this Court squarely rejected defendants' "prescription by pollution" theory, and held that the continuing nature of the pollution emanating from the plant was sufficient to categorize it as a continuing nuisance causing temporary damages, giving rise to a continuing series of causes of action. *Miller v. Cudahy Co.*, 567 F.Supp. 892 (D.Kan. 1983).

The matter was called for a bench trial on March 26, 1984, and concluded on May 15. This Court handed down its opinion in the matter on August 13, 1984. *Miller v. Cudahy Co.*, 592 F.Supp. 976 (D.Kan.1984). Therein, the Court found defendants liable to plaintiffs for actual damages to growing crops in the amount of $3,060,000.00, and also found defendants liable for punitive damages in the amount of $10,000,000.00. Because of trial testimony indicating that a cleanup of the aquifer might be technologically feasible, the Court ordered the punitive damage award held in abeyance pending evaluation of potential cleanup alternatives. The Court ordered the defendants to undertake an investigation of the aquifer in conjunction with an expert to be designated by the plaintiffs, to keep the Court apprised of their discoveries, and to prepare a final report on the available

scientific cleanup alternatives. Pending this, the Court retained jurisdiction over the punitive damage award. The Court certified the judgment of liability and the judgment for actual damages as a final appealable judgment pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. After defendants' motion for a new trial had been denied, they filed notice of appeal on March 18, 1985. However, the Tenth Circuit dismissed the appeal as premature on February 3, 1986, so the case is still before this Court in full.

Investigation towards a possible cleanup began, and a status conference was held before this Court the month after judgment was entered, on September 11, 1984. Defendants procured the expertise of Paul Roux of Roux Associates, Inc., New York, New York, ground water geologists; and of Leonard Eder of Eder Associates Consulting Engineers, p.c., Locust Valley, New York. Plaintiffs retained the services of Dr. Dan Raviv, a ground water hydrologist from West Orange, New Jersey, to monitor and evaluate what the defendants were doing. Plaintiffs had used Dr. Raviv extensively in discovery and trial, and the Court had already found his credibility high and his integrity impeccable. Almost immediately, the remedial investigation became a problem in its own right. Continual controversies arose over plaintiffs' denying defendants access to their lands for the purposes of conducting their investigations, and regarding damages resulting from such access. Progress reports were filed, but it became apparent that the ecological situation was more complex than originally envisioned. The Court had initially ordered that a final report on available alternatives be filed within eight months of the August 13, 1984 Opinion and Order, but it was not until November 20, 1985 that defendants' four volume proposed remedial action plan with supporting documents was filed. That plan, and the subsequent developments of proposed plans, will be discussed later in this Opinion.

In the meantime, numerous motions, related to the cleanup only tangentially if at all, inundated the Court. Following the Court's Order in August of 1984, the expected motions for an amended judgment or new trial, along with motions regarding costs taxed by the Clerk, were filed. But in August of 1985, defendants filed their second (though not last) motion for a new trial. From then until this past summer not a month went by without one of the parties filing a substantive motion of some form for this Court's determination: motions to compel, to quash, to strike; motions for Court appointed experts, for evidentiary hearings, for temporary restraining orders; motions to preclude evidence, to disqualify law firms, to strike affidavits. In the month of February, 1986, alone, six substantive motions, not including motions for extension of time (which inevitably engendered their own controversies), were filed for this Court's consideration. Each motion required responsive filings, some necessitated hearings, all consumed vast amounts of the parties' and the Court's time. While not intimating that the parties' filings of these motions were procedurally impermissible, the Court nonetheless found them frustrating to the original intent of retaining jurisdiction over the case for the sole purpose of considering remedial cleanup plans for potential batement of the punitive damage award. However, as will be demonstrated *infra*, the development and discussion of numerous cleanup proposals were not inhibited by these ancillary actions.

It is the Court's intention in this Opinion and Order to resolve the remaining substantive motions in this action, to evaluate the proposed remedial plans before it, and to enter a final judgment as to all parts of this case. While the Court suffers under no delusion that its action will bring to a close this Jarndycian matter, the Court ardently hopes that by at least allowing the inevitable appellate process to begin, the illusive end of this case may come closer to reality.

II. MOTION TO DISMISS

Defendant General Host has filed with this Court a motion captioned Motion to Reconsider Denial of General Host's Motion to Dismiss. In fact, the Court's review of the voluminous filings in this case reveals that General Host has not previously filed a motion to dismiss. The defendant concedes that this is, in fact, an initial motion for dismissal.

A. *Consideration of Defendant's Reply Memorandum*

Before the Court addresses the merits of defendant's motion to dismiss, it must first resolve a procedural dispute. In the ongoing contentious spirit of this case, plaintiffs have filed a motion to strike the defendant's reply memorandum in support of its motion to dismiss. The parties' pervasive fear that the other side might get the last word on some ancillary or tertiary matter has lead to a preponderance of the collateral attack stratagem of the "motion to strike" throughout the pendency of this case. This approach has been used no less than seven times in the post trial phase of these proceedings. *See* Dk. nos. 593 (plaintiffs' motion to strike portions of defendants' experts' report), 616 (defendants' motion to strike plaintiffs' "Observations and Objections to the Cleanup Plan"), 639 (defendants' motion to strike affidavits), 665 (plaintiffs' motion to strike defendants' memorandum in connection with the entry of a final judgment), 686 (plaintiffs' motion to strike affidavits), 687 (plaintiffs' motion to strike defendants' reply memorandum), and 696 (plaintiffs' motion to strike status report). Each of these motions has then engendered its own series of responses and replies, and required court rulings. Aside from unnecessarily cluttering the file, the absurdity of this situation is demonstrated here by Dk. no. 694 which is (there is simply no other way to put it) "Plaintiffs' reply to defendant's response to plaintiffs' motion to strike defendant's reply to plaintiffs' response

to defendant's motion to reconsider denial of General Host's motion to dismiss." At times, the Court has almost required the services of a cartographer to keep straight which issue these filings address.

Plaintiffs ask the Court to strike this memorandum (the litany will not be repeated) because they allege that it was filed untimely, it is three times as long as the original memorandum in support of the motion and it addresses issues not raised in previous filings. While plaintiffs may have valid concerns, in this case it is simply too late in the day to begin policing the time and length of filings. Plaintiffs' motion is denied. The Court will now address the merits of defendant's motion to dismiss.

B. *General Host's Connection to American Salt*

American Salt was acquired by Cudahy Company around 1930, and operated as a division of that company thereafter. In 1971, General Host acquired a controlling interest in Cudahy Company, and gained full ownership of Cudahy in 1972. Defendant claims that Cudahy was acquired by General Host mainly for its large meat packing business, and that Cudahy's salt division was only an incidental part of that acquisition. In 1984, American Salt was separately incorporated as a wholly owned subsidiary of Cudahy Company, which is a wholly owned subsidiary of General Host Corporation. Apparently, in 1985, Cudahy Company was renamed AMS Industries, Inc., although the Court has not been formally notified of this change. At no time has American Salt been an operating division of General Host Corporation.

Defendant General Host agrees that, by the time it acquired Cudahy Company, American Salt had been in operation over 60 years. In 1968, state monitor wells were installed by KDHE to evaluate groundwater pollution, and the condition of the aquifer resulted in KDHE's requiring American Salt to install the east water well

in 1972, which through continuous pumping since its installation has removed tons of chlorides from the aquifer. Despite this, defendant argues that it did not discover the *extent* of the pollution until after the lawsuit was filed, and then it concedes that most of what it learned was gleaned from the plaintiffs. While apparently not denying *any* knowledge of pollution prior to that time, General Host chides the Court for failing to acknowledge in its Opinion and Order that defendant was the last to discover about the pollution and its connection to the salt plant. General Host disputes the Court's imputation of knowledge of the groundwater pollution to it based on KDHE's imposition of fines for surface spills.

The Court will agree that General Host learned of the groundwater pollution emanating from the salt plant well after plaintiffs or their predecessors, Cudahy Company, and the American Salt plant all knew of the problem. But this fact is inconsequential. General Host cannot deny that it knew there was a pollution problem of some magnitude when it acquired the company. The fact that it was unaware of the extent of that pollution is irrelevant; no one was fully aware of the extent of the pollution until after discovery in the suit began. In fact, as this Opinion and Order will demonstrate later, much has been learned about the extent of the pollution since the trial in this case. But it is hardly a surprising proposition that ignorance of the full extent of the damage caused by one's negligent or willful acts does not afford a defense to liability for those acts.

C. *Timeliness of Motion to Dismiss*

More cogently, General Host argues for dismissal under the doctrine of piercing the corporate veil, on the theory that the Court applied the wrong legal analysis when it originally considered General Host's liability. The Court did not originally address the corporate veil

theory for the simple reason that no motion to dismiss General Host was previously before it. Before the Court can address that theory now, it finds that it must first address a procedural question.

It has already been conceded that, despite the caption of this motion, General Host has not heretofore moved for dismissal. The question therefore naturally arises whether such a motion, made almost two years after *trial* in this case was concluded, is timely. To consider that question, the Court must first determine the procedural basis on which General Host seeks dismissal. For instance, if it was moving for dismissal under Rule 12(b)(1) of the Federal Rules of Civil Procedure, "lack of jurisdiction over the subject matter," timeliness would not be a concern. It is undisputed that a court may dismiss a case for lack of subject matter jurisdiction *at any time*, even on appeal. Fed.R.Civ.P. 12(h)(3). Here, defendant did not specify its grounds for dismissal. The Court, after examining all possibilities, has concluded that the motion must be based on Rule 12(b)(6) of the Federal Rules of Civil Procedure, "failure to state a claim upon which relief can be granted." No other grounds for dismissal are applicable, and defendant's allegation that plaintiff's complaint does not aver any facts showing that General Host Corporation is liable for the plaintiffs' injuries is most appropriately characterized as a motion to dismiss pursuant to Rule 12(b)(6).

While a 12(b)(6) defense is not waived if not made in an original motion or responsive pleading, as are defenses under Rules 12(b)(2), 12(b)(3), 12(b)(4), and 12(b)(5), *see* Rule 12(h)(1), it does not have the open ended nature of a Rule 12(b)(1) defense. Instead, its timeliness is to be considered under Rule 12(h)(2), which allows the defense to be raised at any pleading permitted or required under Rule 7(a), by a motion for judgment on the pleadings, or at trial. Technically, Rule 12(b) requires that all such motions be asserted in a

responsive pleading or a motion filed in lieu of the response. Rule 12(h) only serves to preserve certain *defenses* that could have been asserted initially in a Rule 12(b) motion. After the time for filing a Rule 12(b) motion has passed, such defenses must be raised in the form of a motion such as a motion for summary judgment or for judgment on the pleadings. Wright & Miller, 5 *Federal Practice and Procedure: Civil* § 1357. However, this fine distinction is not dispositive in this case, as defendant has not filed a 12(b)(6) motion, but only seeks to raise a defense allowable under 12(b)(6).

General Host did not move for dismissal upon such grounds in its joint answer with Cudahy Company. It did deny that the American Salt plant had ever been maintained at the direction of any defendant other than Cudahy, which is consistent with its corporate veil argument here. Dk. no. 5, ¶ 9. Additionally, it alleged that all claims for relief set forth in plaintiffs' complaint failed to state a cause of action upon which relief could be granted against either defendant. Dk. no. 5, ¶ 35. But, although it asserted the defense then, it did not then move for dismissal upon those grounds. Nor has defendant since moved for dismissal on such grounds in any motion for judgment on the pleadings, as permitted by Rule 12(h)(2). Finally, defendant did not make such a motion for dismissal at trial.

The Court construes Rule 12(h)(2) as limiting the time for raising such a defense to the enumerated occasions. While that subsection is considerably more permissive than Rule 12(h)(1), it can not be construed to allow such defenses to be raised at any time. If that were so, then the reason for separating out the provisions in Rule 12(h)(3), and specifying that such defenses may be raised "*Whenever*," would not make sense. Instead, the Rules seem clear that the defenses specified in Rule 12(h)(1) must be raised in the initial motion or response, the defenses specified in Rule 12(h)(3) may be

raised at any time, and the defenses specified in Rule 12(h)(2), while not required to be raised initially, cannot be raised indiscriminately but only on the specified occasions. The occasions specified in Rule 12(h)(2) are generous and liberal, allowing such defenses to be raised at any time up to and including trial. But the separate enumerations of 12(h)(2) and 12(h)(3) would indicate to this Court that a motion to dismiss for failure to state a claim upon which relief can be granted cannot be made at any time. More specifically, it cannot be made after trial. Because defendant's motion was not made on one of the allowable occasions, the Court finds the motion untimely.

Although defendant did not discuss Rule 12(h)(2) in any filing connected with this motion, the Court notes that it did discuss it in Dk. no. 706, which deals with a separate issue. There, defendant asserted that such a motion can be made at any time prior to the entry of final judgment. Defendant apparently arrived at this conclusion by running together the "time of trial" and the "time of entry of final judgment." In a normal case, the difference between these two times would be slight. This is not a normal case. There will be a difference of almost three years between the conclusion of trial and the entry of final judgment. In such an issuance, the fine line must be drawn, and the Rule clearly draws it at the time of trial as the latest allowable time. Defendant's motion was not made then, so it was not made timely.

Cases under the Rule, and commentators on it, discuss timing of Rule 12 motions in terms of the time for *filing* a Rule 12(b) motion, and the time for *preserving* a Rule 12(b) defense pursuant to Rule 12(h). The Court has found few cases that discuss the instance where a Rule 12(b) defense is raised timely, but a motion for dismissal on those grounds is not made until after trial. The issue arose on appeal in *Smith v. Atlas Off-Shore Boat Service, Inc.*, 653 F.2d 1057, 1060 n. 1 (5th Cir.

1981), where the Circuit Court allowed the defense of failure to state a claim to be asserted on appeal because, while Atlas did not specifically raise the issue at trial, it "sufficiently alerted the trial court to its contention that there is no claim . . . [and] adequately raised the issue to preserve it for appellate review." *Id.* Likewise, in *Madore v. Ingram Tank Ships, Inc.*, 732 F.2d 475, 479-80 (5th Cir.1984), the Fifth Circuit again noted the rule that the defense that a complaint fails to state a claim upon which relief can be granted must be raised before the completion of trial, but noted that if "the defense is *actually* raised in the trial court, it is not waived by failure to assert it in a specific manner." *Id.* (emphasis added). In *Brule v. Southworth*, 611 F.2d 406, 409 (1st Cir.1979), the court determined that defendants' argument, though presented as jurisdictional, was in reality premised on the contention that plaintiffs had failed to state a claim upon which relief could be granted, and that it was "fatal that defendants never asserted any such ground in the district court, either before or during trial." *Id.* The court noted that the grounds could have been asserted and therefore preserved "by means of a directed verdict, judgment on the pleadings or the like." *Id.* at n. 4. See also *Sartin v. Commissioner of Public Safety*, 535 F.2d 430 (8th Cir.1976).

Based on this authority, the Court must conclude that merely raising the defense in an answer is not sufficient of itself to preserve the defense so that a motion to dismiss based on that defense can be raised at *any time.* While the above cited cases all deal with cases on appeal, it must be conceded that in the normal course of things, a case goes to appeal immediately after trial. The instance here, where the trial court has retained jurisdiction for over two years after trial, merely to fashion the form of the damages awarded, is highly unusual to say the least. The Court points out that it retained jurisdiction for one specific purpose only: to evaluate a potential

cleanup to be implemented in lieu of some or all of the punitive damages award. The Court certified the balance of the decision, including the finding of liability against General Host, for appeal. Although the Tenth Circuit declined to exercise appellate review until the entire case was before it, that does not change the finality of this Court's decision. It is immaterial that the trial court still has jurisdiction over the matter, trial has been held, liability established, and judgment entered. The interests of judicial finality are the same in this instance as they are in the case of appellate review. Absent something more than a bald recital in the defendants' answer of the defense of failure to state a claim upon which relief can be granted, this Court is convinced that the weight of authority is overwhelming that such a motion, made after trial, is made too late. Therefore, the Court must conclude that the Federal Rules of Civil Procedure no longer permit it to entertain such a motion.

Defendant General Host's motion to dismiss is denied as untimely plead.

III. MOTION FOR A NEW TRIAL

A. *Procedural Posture of the Case*

On August 12, 1985, eight years after this case was filed and a year and a half after it was tried, defendants filed a motion with this Court seeking a new trial pursuant to Rules 60(b)(2) and 60(b)(6) of the Federal Rules of Civil Procedure. The ground asserted for their motion was "newly discovered evidence," evidence they were later to assert was "practically conclusive." Dk. no. 573, p. 31. As had become par for this action, the motion was hotly contested and exhaustively briefed by both sides.

On January 31, 1986, the Tenth Circuit Court of Appeals granted defendants' motion to dismiss the appeal in this case as premature. The appeal had been taken pursuant to this Court's order of August 13, 1984, cer-

tifying as final appealable orders the determination of liability and the judgment for actual damages, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. The Circuit, however, held that this Court's judgment was not a final judgment under 28 U.S.C. § 1291. *Miller v. Cudahy*, No. 85-1450 (10th Cir., *unpublished*, January 31, 1986).

Because of the Circuit's ruling, the defendants' motion for a new trial pursuant to Rule 60 was procedurally premature. Therefore, on February 10, 1986, they filed a motion for an evidentiary hearing to revise and amend the findings of fact and conclusions of law issued by this Court on August 13, 1984, or, in the alternative, for a new trial, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure. They seek essentially the same relief sought in their earlier new trial motion. This motion was filed only to restate, on procedurally correct grounds, their request for that relief. Defendants in that motion incorporate by reference all of their earlier "new trial" filings. Therefore, the Court will consider the two motions and their progeny filings together.

B. *Standards for Motions for New Trial or To Revise and Amend*

1. *Federal Rules of Civil Procedure*

Rule 54(b) provides as follows:

> Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determina-

> tion and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties *shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.* (emphasis added).

It is clear that under this Rule the Court retains the power to alter decisions until final judgment is made in a case. *Paramount Pictures Corp. v. Thompson Theatres*, 621 F.2d 1088, 1090 (10th Cir.1980); *United States v. Desert Gold Mining Co.*, 433 F.2d 713, 715 (9th Cir. 1970). But the real question is not if the Court can alter rulings, but whether the Court should. While Rule 54(b) implicitly allows revisions, it does not address under what circumstances or for what causes such revisions should be made. Considering that this action was a trial to the court and not to a jury, the Court finds that in this instance a motion to alter or amend is essentially a motion for a new trial. Therefore the Court finds that its consideration of this issue should also be governed by Rules 59 and 60 of the Federal Rules of Civil Procedure, which provide in relevant part:

> Rule 59. New Trials; Amendment of Judgments
>
> (a) Grounds. A new trial may be granted to all or any of the parties and on all or part of the issues . . . (2) in an action tried without a jury, for any of the reasons for which rehearings have heretofore been granted in suits in equity in the courts of the United States. On a motion for a new trial in an action tried without a jury, the court may open the judgment if one has been entered, take additional testimony, amend findings of fact and conclusions of law or make new findings and conclusions, and direct the entry of a new judgment.

(b) Time for Motion. A motion for a new trial shall be served not later than 10 days after the entry of judgment.

Rule 60. Relief from Judgment or Order

(b) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time. . . .

Because defendants timely filed a new trial motion following the August, 1984 entry of judgment, and because the instant motion was filed within ten days of the Circuit's ruling, the Court finds that none of defendants' motions now under consideration are time barred. Because this action was tried to the Court, all motions are being considered in conjuiction for the relief the defendants seek, procedural distinctions aside. Motions for new trial and for reconsideration are closely related, so the movants should be granted whatever relief their motion shows them entitled to. *United States Gypsum Co. v. Schiavo Brothers, Inc.*, 668 F.2d 172 (3rd Cir. 1981), *cert. denied*, 456 U.S. 961, 102 S.Ct. 2038, 72 L.Ed.2d 485 (1982). The Court notes that defendants' new trial motion of August 12, 1985, sought relief pursuant to Rules 60(b)(2) and 60(b)(6).

2. *Case Law*

Motions for new trials, relief from judgment, or to alter or amend the court's findings and conclusions are directed to the discretion of the court. *Allied Chemical*

Corp. v. Daiflon, Inc., 449 U.S. 33, 36, 101 S.Ct. 188, 190, 66 L.Ed.2d 193 (1980); *Clarke v. Burkle*, 570 F.2d 824, 830 (8th Cir. 1978); *Kargman v. Sullivan*, 582 F.2d 131, 135 (1st Cir. 1978); *Ope Shipping, Ltd. v. Underwriters at Lloyds*, 100 F.R.D. 428, 431 (S.D.N.Y. 1983). The standard of review for a district court's decision on these matters is abuse of discretion. *Howard D. Jury, Inc. v. R & G Sloane Mfg. Co., Inc.*, 666 F.2d 1348, 1352 (10th Cir. 1981); *Washington Mobilization Committee v. Jefferson*, 617 F.2d 848, 850 (D.C. Cir. 1980). Motions seeking new trials or relief from judgments on the basis of newly discovered evidence seek extraordinary relief and will be granted only in exceptional circumstances when the requirements are strictly met. Such motions are disfavored. *Dabney v. Montgomery Ward & Co., Inc.*, 692 F.2d 49, 52 (8th Cir. 1982), *cert. denied*, 461 U.S. 957, 103 S.Ct. 2429, 77 L.Ed.2d 1316 (1983); *Goland v. Central Intelligence Agency*, 607 F.2d 339, 370 (D.C. Cir. 1978), *cert. denied*, 445 U.S. 927, 100 S.Ct. 1312, 63 L.Ed.2d 759 (1980); *Link v. Mercedes-Benz of North America, Inc.*, 618 F. Supp. 679, 693 (E.D. Pa. 1985), *aff'd in part, vacated in part*, 788 F.2d 918 (3rd Cir. 1986); *Swift Chemical Co. v. Usamex Fertilizers, Inc.*, 490 F. Supp. 1343, 1350-51 (E.D. La. 1980), *aff'd*, 646 F.2d 1121 (5th Cir. 1981), *rehearing denied*, 650 F.2d 282 (5th Cir. 1981); *Wilson v. Fonte*, 82 F.R.D. 632, 634 (E.D. Pa. 1979).

The law is well settled that to reopen trial proceedings for newly discovered evidence, three requirements must be met. First, the evidence must have existed at the time of trial, but not have been known to the movant. Second, the evidence must be such that it could not have been discovered in time to present it at the original proceedings by the exercise of due diligence. And third, the evidence must be such that it would probably have produced a different outcome had it been presented initially. *Branca v. Security Benefit Life Insurance Co.*, 789 F.2d 1511

(11th Cir. 1986); *Equal Employment Opportunity Commission v. Rath Packing Co.*, 787 F.2d 318, 331 (8th Cir. 1986), *cert. denied*, —— U.S. ——, 107 S.Ct. 307, 93 L.Ed.2d 282 (1986); *Hoyt R. Matise Co. v. Zurn*, 754 F.2d 560, 568 n.14 (5th Cir. 1985); *Ope Shipping, Ltd.*; 100 F.R.D. at 432; *Champion Spark Plug Co. v. Gyromat Corp.*, 88 F.R.D. 526 (D. Conn. 1980), *aff'd* 636 F.2d 907 (2d Cir. 1981). These three factors will govern the Court's consideration in this case.

For this matter, the Court would particularly emphasize two of those factors. Of preeminent concern in evaluating defendants' "newly discovered evidence" is whether that evidence, by the exercise of due diligence, could have been discovered in time for trial. A judgment may not be set aside, or in this case modified or amended, on the grounds of newly discovered evidence where that evidence is the type which with due diligence the defendants could have discovered in time for the original trial or proceeding. *Music Research, Inc. v. Vanguard Recording Society, Inc.*, 547 F.2d 192 (2nd Cir. 1976).

Even if the evidence is such that it could not by due diligence have been discovered, to support a motion for a new trial the evidence must be material to the issues and must be of such a nature that it would probably change the outcome. *Stridiron v. Stridiron*, 698 F.2d 204 (3rd Cir. 1983). While this factor is most generally applied to exclude evidence that is merely cumulative or impeaching in nature, it goes beyond that. New evidence, even if genuinely new and material, regarding a relevant aspect of the trial subject matter and regarding an issue that was not presented at the trial or that would have cast evidence presented at trial in a significantly different light, does not thereby automatically warrant a new trial. Instead, the Court must look at the new evidence in light of the total evidence presented at trial. Where the weight of the evidence presented at trial is so overwhelmingly in support of the initial verdict that the in-

troduction of this new evidence, probative and significant though it may be, would still not have changed the final outcome, then a new trial is not justified. "The strength or weakness of the evidence against the defendant is an important and often decisive factor in judging the new evidence supporting a motion to vacate, because the fundamental purpose of the Rule 60(b) motion is to prevent the judgment from becoming a vehicle of injustice." *United States v. Walus*, 616 F.2d 283, 288 (7th Cir. 1980).

In a matter that was tried to a jury, the Court perhaps must be careful in making such a determination as to the outcome altering nature of this new evidence, and give the movant the benefit of any doubt. But in a matter such as this which was tried to the Court, the Court can assess even the closer questions, and if it determines that the introduction of this newly discovered evidence, viewed in the best possible light, would still not have changed the verdict as to liability or damages, then it need not order that a new trial or hearing be held.

C. *Newly Discovered Evidence: Proffered*

In light of these standards governing the exercise of the court's discretion as to whether to grant a new trial or hearing to alter or amend its original findings of fact and conclusions of law, the Court will now review the proffered "newly discovered evidence." Defendants assert that this evidence is relevant to punitive damages, equitable relief, liability and actual damages; in short, to everything. The Court will not add to the already lengthy nature of this opinion and order by reviewing the exhaustive findings and conclusions made initially in its Opinion, reported at *Miller v. Cudahy Co.*, 592 F. Supp. 976 (D. Kan. 1984).

Defendants offer a wealth of new evidence, which the Court shall attempt to arrange in some form of topical grouping. The Court is repeating here only the evidence

proffered by defendants. It should be emphasized that this recitation is not to be taken as the Court's acceptance of these "facts" as proven. Plaintiffs have not had an opportunity to conduct discovery of their own on these issues, nor to cross examine defendants' reports. Should a new trial or hearing be held the facts found there may differ from this proffer. The Court only examines defendant's "new evidence" to determine if, taking all of their assertions as true, the evidence would warrant a new trial.

Defendants assert that their testing has revealed several hitherto unknown aspects of the aquifer. Among these are that the rate of groundwater flow and recharge rate is much slower than was believed at trial. Additionally, defendants have discovered that sodium pollution, rather than chloride pollution, from the brime presents the major obstacle to an environmental cleanup. Due to a phenomenon known as the Sodium Adsorption Ratio [SAR], the pollution will take much longer to clear. The problem presented by SAR is that the clay particles surrounding the aquifer absorb sodium from the polluted water, then, after all of the polluted water will have hypothetically passed and clean water is flowing through the aquifer, the clay would release sodium into that water, repolluting the water. Because of this, it is not sufficient for all of the presently polluted water to flow through the area (assuming no further pollution, an assumption not warranted by any facts at this time); instead, two to three times that amount of water must flow past the sodium laden clay in order to thoroughly "rinse" out the pollution. Because the aquifer is moving much slower than originally believed, and because much more water will be required to flow through the aquifer to cleanse it than originally believed, defendants assert that the aquifer would not naturally cleanse itself of the salt plume in twenty to thirty years as suggested at trial. In fact, defendants suggest to this Court that it would

take two to three hundred years for such a cleansing to occur!

As a corollary to the reduced recharge rate of the aquifer, defendants assert that the aquifer, even in an unpolluted state, would not support irrigation by all of the plaintiffs. They direct the Court's attention to the recently reduced irrigation permit allowances by the Big Bend Groundwater Management District. Under these restrictions, plaintiffs could not all obtain permits to irrigate the affected land even if good water existed. Defendants further assert that, had plaintiffs all been irrigating, in light of the aquifer's low recharge rate the aquifer would have been severely mined by now, and perhaps permanently damaged. Defendants further assert that more accurate mapping of the plume has revealed that some of the plaintiffs' land is not even affected by the underground water pollution, and that some of the plaintiffs' land has access to good water for irrigation. Defendants assert that these facts go to the actual damages awarded at trial.

Defendants allege to have discovered another plume "upstream" from this one, emanating from an old Carey salt mine. Although this plume does not now join with the plume which is the subject of this dispute, defendants attempt to imply that the plumes may once have been connected (without explaining how they could have once been connected and are not now, since both flow in the same direction). Defendants therefore assert that American Salt may not be solely to blame for the instant plume. They further assert that the pumping of one of their wells is preventing this plume from spreading further, and congratulate themselves for this without showing that it has any relevance to the present suit.

Defendants assert that recent testing has shown that, contrary to the finding made by this Court following trial, their brine fields are not leaking. The Court would

note that plaintiffs hotly dispute this "finding," as they did at trial. As will be demonstrated below, evidence offered during the remedial phase of this case, not the least of which was from Kansas Department of Health and Environment, continues to support the Court's original finding that the brine fields have been leaking and are continuing to leak.

Defendants assert that, based on the slow flow rate of the aquifer and the presence of an intercept well on their property, any chlorides that escape from the plant will be (and have been) intercepted before they reach the aquifer lying under any of the plaintiffs' land. Therefore, they are not now causing any pollution to plaintiffs' property.

These are the meat of defendants' proffered "new evidence." Again the Court would emphasize that this "evidence" has not been subjected to plaintiffs' scrutiny, and the facts are therefore not proven facts. The Court will now evaluate them in light of the earlier listed standards for granting a new trial motion.

D. *Newly Discovered Evidence: Evaluated*

1. *Groundwater Management District's Permit Requirements*

Initially, the Court dismisses consideration of the recently revised Big Bend Groundwater Management District's permit requirements. That revision occurred after the trial in this matter, and as such did not exist at the time of trial. "Compelling policies of finality require that in the absence of exceptional circumstances, events occurring after a trial on the merits cannot justify the reopening of a judgment." *County of Trinity v. Andrus*, 77 F.R.D. 29, 30 (E.D. Cal. 1977). Defendants argue that this rule does not apply here because the revised regulations only reflect the realities of the aquifer, realities which existed at the time of trial. The Court will

consider the "newly discovered" aquifer characteristics shortly. The Court notes, however, that at trial one of the factors considered in the damage award was that plaintiffs could have obtained permits to irrigate *but for* the fact that the water was unsuitable for irrigation (Kansas law does not allow a permit to be granted for irrigation unless it will actually be put into use; where the water cannot be used, as here, no permit will be granted solely for that reason).

Had plaintiffs in fact been given irrigation permits and begun to irrigate, and had such irrigation in fact so seriously threatened the aquifer as to cause the groundwater management district to take action, the Court cannot speculate on what action the Groundwater Management District would have taken. It is possible that they would have revoked some of the farmers' irrigation permits, but it is just as possible that they would have revoked some of American Salt's water permits, especially since American Salt holds the lion's share of the area's permits. The fact remains that, at the time of trial, plaintiffs could have obtained permits for irrigation if not for the pollution. That permit requirements were later changed so that, today, they could not obtain such permits even were the water pure, is immaterial.

2. *Ancillary Motion to Revise or Amend: Lost Crop Profits*

The Court should note at this point that defendants disagree with some of the assertions just made regarding plaintiffs' ability to obtain irrigation permits. They have, in fact, filed a "Motion to Revise or Amend the August 13, 1984 Opinion to Dismiss the Claims for Lost Crop Profits of those Plaintiffs Who Have No Water Permits to Irrigate Their Lands." Dk. no. 697. This motion to revise or amend is separate from the motion to revise or amend which the Court has been discussing (Dk. no. 604), and from the motions for New Trial, or in the alternative, to Revise or Amend which defendants

have filed previously (Dk. nos. 526, 462). Defendants assertion in the instant motion, Dk. no. 697, is that the plaintiffs, with the exception of three who had secured water permits, cannot recover for lost crop profits due to their inability to irrigate because they had no permit, and therefore no legal right, to irrigate.

Defendants present the Court with a detailed review of Kansas law on water rights. They assert that plaintiffs could have acquired a "vested right" to water prior to July 1, 1980, if they had made "continuous application for water for beneficial use since on or before June 28, 1945." Dk. no. 697, p. 5, citing K.S.A. § 82a-701(d). Of course, as this Opinion has previously demonstrated, pollution of the water which prevented any beneficial use has existed since well before 1945. Defendants unsurprisingly do not mention this. They also assert that plaintiffs could have acquired an "appropriation right" through the permitting process. Defendants do not actually deny that use of the water is necessary to obtain and maintain a permit. They do assert with great aplomb that neither state law or groundwater management district rules and regulations "require a water quality test as a condition for obtaining a permit." Dk. no. 697, p. 6. They further suggest that all plaintiffs needed to have done was file an application and obtain a permit while water rights were still available and then timely request extensions for perfecting the permit, i.e., putting the water to beneficial use. Defendants assure the Court that plaintiffs could have obtained an exception to the rule that water rights not used for three consecutive years are forfeited, base upon a showing of due and sufficient cause (pollution). By following these steps, defendants conclude, "[p]laintiffs would thereby have secured their right to use the water as soon as it was clean." Dk. no. 697, p. 10. Of course, these are the same defendants who initially suggested to plaintiffs and to this Court that the water would not be clean for two

hundred years. *See* V. REMEDIAL ACTION PLANS, *infra*.

From a theoretical standpoint, plaintiffs may have been able to obtain some type of water permits by following the contorted process defendants suggest. But this interesting legal theory has no application to the real world in which plaintiffs live. They are landowners, not barristers. They only wish to spend their time farming, not engaging in the testing of novel legal theories. State agencies such as the Big Bend Groundwater Management District and the State Board of Agriculture, Division of Water Resources have suggested to the Court that one could not obtain a permit for water unless he actually were to use the water. *See* Transcript of June 2, 1986 hearing, pp. 46, 50. Of course, this water is unusable. If this interpretation by the state agencies is not technically correct, assuming without deciding that defendants' suggestion is a theoretical possibility, the plaintiffs are not to be faulted for relying on that understanding. Plaintiffs did not seek water permits because they could not use the water, even if they had permits. To conclude therefore that they are estopped or precluded from receiving damages for their inability to irrigate is inequitable; it turns the law on its head. Speaking of the Kansas Water Appropriation Act, the Kansas Supreme Court said:

> Under this declaration and other provisions of the act we now approach [questions concerning water rights] upon the basis of the interest of the people of the state without losing sight of the beneficial use the individual is making or has the right to make of the water. *Unused or unusable rights predicated alone upon theory become of little if any importance.*

State, ex rel., Emery v. Knapp, 167 Kan. 546, 555, 207 P.2d 440 (1949) (emphasis added). Defendants' suggested course of conduct may make sense in an Alice-in-Wonderland world; it makes no sense in ours.

Further, plaintiffs demonstrate that defendants' intervening cause argument—that the intervening cause of the failure of plaintiffs to obtain water permits for irrigation precludes their right to recover for loss of irrigated crops due to the pollution—is fatally flawed. Defendants' argument presupposes that there is no relationship between the pollution and the failure of plaintiffs to obtain permits. But testimony received has demonstrated that plaintiffs have not applied for or received permits because the pollution prevented use of the water. The failure to obtain permits is not a cause of plaintiffs' inability to irrigate; both the inability to obtain permits and the inability to irrigate are a result of defendants' pollution of the aquifer. Evidence from plaintiffs and state officials has suggested, and the Court so finds, that it would have been futile for plaintiffs to apply for irrigation permits so long as the water was unfit for irrigation. Therefore, plaintiffs failure to apply for permits is excusable and does not bar their recovery for lost crop profits.

Defendants argue that plaintiffs' claim of futility is "totally spurious because the filing of a permit application is not 'futile' but a requisite first step to obtaining a water right." Dk. no. 697, p. 10. This argument is nonresponsive. Filing of a permit application is a requisite first step to obtaining a permit, but when other circumstances will bar the issuance of a permit, and those circumstances are known initially, the filing for a permit becomes *both* a requisite first step and a futile act. Plaintiffs' futility argument is not totally spurious, but defendants' tortuous dance around the law and the facts is.

Defendants' motion regarding lost crop profits is denied. Plaintiffs' inability to obtain water permits augments their claim against defendants; it does not bar it. That Big Bend has subsequently revised the allowable amount of water permits available due to discovering the reduced aquifer recharge rate likewise does not

bar plaintiffs' action against defendants. Any difficulties which plaintiffs might encounter now in seeking to obtain water permits is immaterial to their previous failure to apply for permits. They did not apply when permits were available because defendants' pollution prevented permits from being obtainable. The reduced permit allowances are not properly considerable as "newly discovered evidence," and do not operate as a bar to plaintiffs request for damages against defendants. The Court will now examine the remaining proferred newly discovered evidence.

3. *Due Diligence*

The remaining "newly discovered facts" all seem to be of the nature of facts that did exist at the time of trial. Regarding these, defendants boldly assert that these facts are practically conclusive in themselves, and chide the Court that "[t]he only reasonable solution is for the Court to recognize that the *real facts are the facts*, regardless of when they were discovered." Dk. no. 605, p. 5. Defendants cite no authority for this proposition, which is hardly surprising since, despite the appealing sound of the assertion, there is no authority for that statement as constituted. Even assuming that these "facts" could survive plaintiffs' scrutiny and emerge unscathed as the "real facts," and even assuming that these "real facts" were indeed conclusive in and of themselves, that is hardly the starting point in a motion for a new trial or a motion to alter and amend the court's findings. Instead, the initial question must be, could these alleged facts have been discovered by defendants' exercise of due diligence in time for the trial? Or, put another way, how many of these alleged facts could defendants not have discovered in time for trial, as opposed to how many they did not discover?

Defendants certainly did not lack for time. This case, filed nearly ten years ago, was in discovery for seven

years before it was finally called to trial. Instead, it is very clear to this Court, which has watched the tortuous course of this case unfold, that defendants made a policy or strategy decision not to test the aquifer, not to investigate the complaints, not to inspect the damage; in short, to do nothing but ignore the entire matter. This course of inaction was followed despite requests by KDHE to test, and despite fines and the threat of further, more serious action by KDHE. It was done despite the pendency of this suit, and despite the sordid history spanning a half a century of complaints by neighboring land owners and state agencies regarding pollution. Defendants' strategy was to pooh-pooh the allegations that they were polluting and to pretend that there was nothing to be alarmed about. Considering that this was the company line not only for the seven years of discovery in this case, but for the fifty years of plant operation, the Court will not now hear them say that they could not have discovered what the "real facts" of the aquifer were until after this suit. They made a conscious decision not to investigate the "real facts." They must now live with that decision.

Defendants deny that they had seven years to investigate this matter. They instead plead that they had no reason to look for this type of evidence until this Court's order of June 21, 1983, *Miller v. Cudahy Co.*, 567 F.Supp. 892 (D.Kan.1983). Defendants pretend that the 1983 order "radically altered" this litigation. Dk. no. 527, p. 25. The Court's opinion of this claim of "surprise" is unprintable. The only thing that was radically altered by the 1983 order was that defendants were finally disabused of their notion that their beloved statute of limitations defense was the panacea to all their legal problems. As previously mentioned, defendants believed (or hoped) that their "prescription by pollution" theory would prevail; that if they polluted the environment long enough, it was theirs; and that they could not be called

to account for what they did to it. The Court's 1983 order refused to accept this base proposition. It is apparent to the Court that defendants continue to hold fast to this favorite son principle; but this Court continues just as strongly in its abhorrence to that line of defense.

In fact, the "radical change" wrought in this matter by the 1983 order was not so radical as to suddenly require testing of the aquifer to determine the damage done, whereas before none had been required. This action was brought initially alleging pollution of the aquifer, and damage to the plaintiffs' ability to irrigate as a result thereof. While there were varying arguments of permanent or temporary damages, which the 1983 order resolved, by no reasonable legal theory could the preresolution of that matter be regarded as putting the case in a posture where the condition of the aquifer which was alleged to be polluted was immaterial to the case.

Even were the Court to accept defendants' proposition that the defendants did not know it was necessary to test the aquifer until after the 1983 order, the Court could still not find that defendants are excused from not discovering this evidence prior to trial; that they could not have discovered it with the exercise of due diligence. The order "radically altering" the case was handed down on June 21, 1983. The case was called for trial on March 26, 1984, nine months later. Defendants contend that these nine months were insufficient to conduct the necessary discovery. They admit that they did not seek a continuance for the purpose of obtaining sufficient time to conduct this suddenly necessary investigation, but seek to excuse their failure on that account by complaining that the Court would not have allowed another extension in this already protracted matter then anyway. Whether the Court would have granted or denied a motion for continuance to allow additional discovery is speculative; what is certain is that defendants did not request continuance.

If, as they claim, the 1983 order had indeed "radically altered" the course of this litigation, then seeking such a continuance would have been a natural, almost necessary, consequence. That they did not then seek such a continuance is perhaps indicative of the fact that they did not then truly believe that the litigation had been that altered. At any rate, the Court finds it passing strange that, after seven years of discovery defendants were too concerned about the protracted nature of the suit to seek an extension of a few months; but now after ten years of proceedings, they are not so concerned but that they seek a new trial, which would cause at least another year of activity at the district level.

Moreover, the Court is unpersuaded that those nine months were so fleeting as to not warrant even beginning an investigation. The Court handed down its judgment in this case on August 13, 1984. On September 11, 1984, a status conference was held with the parties concerning the development of a remedial investigation. At that time it was envisioned that the results of this investigation would be presented to the Court by April 1985, as ordered in the August ruling ("a final report . . . shall be filed with the Court within eight months of the date on which this Opinion and Order is filed." 592 F.Supp. at 1009.). Although the defendants now plead that the nine months between the 1983 order and the commencement of trial were too brief to warrant even beginning an investigation, they did not complain the next year when instructed to complete an entire remedial investigation within eight months. In fact, the development of the investigation later required them to seek extensions of time, but their final *four volume* report was filed with the Court on November 20, 1985, fourteen months after the status conference.

Thus, even if the Court were to accept defendants' argument that testing of the aquifer was not required until after the 1983 order, and even if the Court were to

accept defendants' excuses for not seeking an extension of time in which to complete this testing, the Court could still not find that defendants were excused from the due diligence requirement to discover the facts prior to trial. Even then, sufficient time existed to begin an investigation. Defendants instead chose not to investigate. What their strategy was, whether hoping for an appellate resurrection of the "prescription by pollution" theory, or whether fearing that any facts uncovered could only hurt their cause, the Court can not divine. But it is painfully clear that the defendants, without excuse, made a decision not to investigate the damage to the aquifer. Not until forced by the Court, under threat of a ten million dollar punitive award, did they begin a remedial investigation. If the facts of that investigation have yielded evidence they believe would have been helpful at trial, that is unfortunate for them. "[D]efendant's desire to introduce additional evidence after losing the case [does] not constitute a proper ground for granting a new trial." *Brown v. Wright*, 588 F.2d 708, 710 (9th Cir.1978).

Adopting defendants' theories would insure that no case was ever final; a party could drag its discovery out piecemeal and thereby require continual retrials. Even if it had no hope of winning, it could hope to wear its opponent down. Indeed, it is not surprising that defendants have attempted this approach; American Salt threatened plaintiffs years ago that if suit was filed "the money and lawyers available to American Salt would enable it to drag any litigation out for years, bankrupt [the plaintiffs] in the process, and take [their] land." *Miller*, 592 F.Supp at 996. That threat has come close to becoming a reality. The disparity of resources between the parties has been a constant problem in this suit. It has resulted in the defendants being able to make voluminous filings of briefs, argument and research far in excess of what the plaintiffs can match. "The defendants have seemingly limitless resources for the filing of writ-

ten motions, memoranda, etc., in this case; their resources for so doing are far greater than those of the plaintiffs and their attorneys." Dk. no. 609, p. 2. At recent hearings, plaintiffs' counsel has made it clear that her clients have severely limited, for financial reasons, what additional legal action she could take.

The Court is sympathetic to the plight of the plaintiffs, who, though small farmers, have been forced to pay the costs of this action for ten years and have so far gained no remuneration from it. Any additional delays sought by the defendants must be balanced against the increasing chance that rising costs to the plaintiffs may force them to abandon their action, especially in light of defendants' earlier threat to do just that. This Court will not tolerate that type of litigation strategy. The Court finds that there was ample opportunity to discover this evidence during the years of discovery, and that defendants' failure to do so warrants a denial of their motion now. *McClean v. Alexander*, 449 F.Supp. 1251, 1263 (D.Del.1978), *rev'd on other grounds*, 599 F.2d 1190 (3rd Cir.1979).

Due diligence going to a new trial motion is a factual determination. The Court finds that had defendants exercised due diligence, they could have discovered this evidence in time for trial. Their failure to exercise diligence requires that their new trial/relief from judgment/amend findings of fact and conclusions of law motions be denied.

4. *Outcome Altering Effect of New Evidence*

Although not necessary to the resolution of defendants' motions, the Court further determines that, even had defendants exercised due diligence, their motion would not be granted. This Court sat as the fact finder in the original proceedings and heard the wealth of evidence presented there over the course of thirty-three days of trial. The weight of evidence against the defendants and in support of the final verdict was overwhelming.

Examining the proffered "new evidence," even without benefit of plaintiffs' critique, the Court is persuaded that nothing is proffered which would have changed the verdict as to liability or punitive damages. The evidence could only possibly go to actual damages. While recognizing that the Tenth Circuit's order in this case leaves the entire verdict, including actual damages, open to revision, this Court considered the actual damages phase of the suit to be over when the trial concluded in May of 1984. Nothing defendants have shown the Court now persuades it that its decision was wrong, or that the case should be reopened.

5. *Due Process Considerations*

Defendants warn the Court that an evidentiary hearing must be held because it would "avert any due process problems which might arise if the Court failed to afford the parties herein the opportunity to fully and fairly develop and present the evidence which has been discovered." Dk. no. 605, p. 6. The Court agrees more with plaintiffs, who remind us that despite defendants' "deep rumblings" about due process, due process is governed by the rules and authorities with which this Court has already evaluated defendants' motions.

Due process does not require that parties be allowed to present any evidence that they want to, at any time, regarding any subject matter, in complete disregard to the established rules of evidence and civil procedure. It only requires that the party suffering a loss be given an opportunity to be heard "at a meaningful time and in a meaningful manner." *Goldberg v. Kelly*, 397 U.S. 254, 267, 90 S.Ct. 1011, 1020, 25 L.Ed.2d 287 (1970). To suggest that this Court has not afforded defendants a meaningful opportunity to be heard is laughable. In addition to a very lengthy trial, numerous hearings have been held in this matter, some of them as long as a normal trial. At each of these hearings, defendants

have been given full opportunity to present evidence and to examined plaintiffs' evidence (the sole exception being the very last hearing held in this matter at which neither plaintiff nor defendant were allowed to present evidence, but where the Court received in open court the reports of state agencies' evaluations of the proposed plans). Literally thousands of pages of memoranda have been filed by defendants. The Court has noted at some of these hearings that, if anything, this case was being "due processed to death." For the defendants to suggest now, after ten years of activity, months of trial time, and volumes of pleadings that due process is being denied them is perhaps one of the most outlandish claims this Court has ever heard. If this matter has any problems, denial of due proces certainly is not one of them.

6. *Any Other Reason for a New Trial*

In addition to seeking relief pursuant to Rule 60(b)(2), "newly discovered evidence," defendants also seek a new trial pursuant to Rule 60(b)(6), "any other reason." This rule is not an open ended invitation to seek a new trial for any reason, but is only designed to allow the Courts to do justice when equity demands, but the Rules otherwise do not provide authorization. This rule is especially "not a substitute for a motion for a new trial, particularly when it is grounded upon evidence which could have been discovered and timely presented through the exercise of due diligence." *Inter Financing Exchange S.A. v. Bartlett & Co., Grain*, 659 F.2d 1320, 1321 (5th Cir.1981). No other reason has been shown to the Court why a new trial or the functional equivalent is warranted. Therefore, application of this Rule is not justified.

A motion for new trial is an extraordinary request, directed to the discretion of the Court. Defendants have not begun to meet their burden of demonstrating that the proceedings should be reopened. The Court has not

been shown that justice requires it. Indeed, justice requires that plaintiffs not be caused to pay for defendants' conscious decisions not to investigate earlier. The motions shall be denied.

IV. COSTS, EXPENSES AND FEES

On February 6, 1986, plaintiffs filed a motion for the award of Costs, Expenses and Fees incurred in conjunction with the remedial phase of this case (Dk. no. 602). They filed an itemized list of expenses for which they sought reimbursement. Receipts verifying most of the expenses for such reimbursement were attached to their motion. Because the case was in the midst of the remedial hearings at that time, the Court postponed ruling on plaintiffs' motion, anticipating that any expenses of that nature which they had incurred they were likely to continue incurring. This presumption has proven accurate. Plaintiffs filed addendums to that motion, setting out additional like expenses incurred, on April 23, 1986 (Dk. no. 654); May 5, 1986 (Dk. no. 658); and May 9, 1986 (Dk. no. 659). The categories of expenses for which reimbursement is sought are transcripts, witness fees (including those expenses denominated as "Subpoena" in Dk. no. 659), laboratory expenses, expert expenses, telephone expenses, copying expenses, postage, attorneys' travel expenses and attorneys' fees.

A. *Background*

Before discussing the relevant merits of each requested item, the Court first emphasizes the unique nature of the proceedings which resulted in these expenses. All costs requested are for post trial proceedings, unlike the vast majority of reported cases dealing with costs which involve pretrial expenses only. The development and presentation of various plans that defendants have offered has proven to be a complicated and controversial matter, as this opinion will discuss later in some detail. The plaintiffs

have incurred substantial additional expense in the course of this matter: post trial filings made have been nearly as voluminous as the pretrial filings (which themselves ran into hundreds of docket entries and thousands of pages). The Court has attempted to make it clear throughout the long and contentious course of this remedial phase that the plaintiffs had *already won* the case, and that the Court felt that they should not be further penalized or prejudiced by post trial hearings or expenses collateral to defendants' development of the remedial action plan. Neither plaintiffs' verdict nor their damages were in jeopardy during these proceedings; both had been established during trial at considerable expense to the plaintiffs—expenses for which they do not seek reimbursement. This portion of the case could not gain for them any additional benefit; it was not a hearing to determine the *amount* of damages, but only to determine the *form* which the damages might take. If any side stood to gain from these proceedings, it was not the plaintiffs, but the defendants, whose damages might be remitted in part due to their remedial efforts if equity justified it.

Moreover, the Court cannot ignore the economic disparity between the parties. Defendants are divisions of a large, multi-corporate entity; plaintiffs are merely local landowners/farmers. This disparity may have been irrelevant during the trial of the action plaintiffs themselves brought, but it is a valid consideration in a phase where plaintiffs have won the trial and the form of damages itself is the only consideration. The Court recognizes that defendants' expenses during this phase of the proceedings have been substantial and have far exceeded the plaintiffs' costs; but the Court also recognizes that defendants are more able to afford the expense than plaintiffs are, and that these proceedings are only for the benefit of the defendants. With these considerations in mind, the Court will now make the following determinations.

B. *Statutory Authority to Tax Costs*

The Court is authorized in its discretion to tax certain costs against the defendants pursuant to 28 U.S.C. § 1920. Among these are fees of the court reporter for transcripts and witness fees for nonparty witnesses. These fees the Court taxes against defendants.

The remaining categories of expenses the Court characterizes into the following groups: Attorneys' fees (including both fees and attorney travel expenses); discovery costs (including telephone expense, copying and postage); and expert fees (including laboratory expenses and expert fees). The Court will discuss them seriatim.

C. *Discovery Costs*

The discovery costs sought by plaintiffs are not specifically authorized by any statute as costs which may be awarded. Discovery costs normally are not recoverable, as defendants point out, citing a previous opinion of this Court. *Miller v. City of Mission*, 516 F.Supp. 1333, 1339 (D.Kan.1981) (quoting *Quandt v. Beech Aircraft Corp.*, No. W-4464 (D.Kan., *unpublished*, Apr. 24, 1981)). Like other such costs, though discovery costs may be taxed in certain circumstances. *Worley v. Massey-Ferguson, Inc.*, 79 F.R.D. 534 (N.D.Miss.1978). The Court is granted a certain amount of discretion on such items pursuant to Rule 54(d) of the Federal Rules of Civil Procedure, which provides: "Except when express provision therefor is made either in a statute of the United States or in these rules, costs shall be allowed as of course to the prevailing party unless the court otherwise directs. . . ." While the discretion granted the Court pursuant to this statute normally only applies to statutory items, *see* 28 U.S.C. § 1920, the Court in its discretion may also award non-statutory costs which were reasonably incurred. *Schmid v. Frosch*, 609 F.Supp. 490, 492 (D.D.C.1985).

It is not surprising that the taxing of items such as postage, copying and telephone calls have not been clearly

settled by statute, rules or case law. The Court has found instances in which such items were all taxed, *see, e.g., Zeffiro v. First Pennsylvania Bank, N.A.*, 574 F.Supp. 443, 449 (E.D.Pa.1983), *on reconsideration*, 581 F.Supp. 811 (E.D.Pa.1983), *aff'd* 746 F.2d 1465 (3rd Cir.1984); and instances in which all items were all not, *see, e.g., Keith v. Volpe*, 501 F.Supp. 403, 415 (C.D.Cal.1980). Other examples abound of either allowing these types of expenses, *see, e.g., Lenard v. Argento*, 699 F.2d 874, 900 (7th Cir.1983), *cert. denied*, 464 U.S. 815, 104 S.Ct. 69, 78 L.Ed.2d 84 (1983); *Clark v. Marsh*, 609 F.Supp. 1028, 1035-36 (D.D.C.1985); *Davis v. Reed*, 72 F.R.D. 644 (N.D.Miss.1976); or of not allowing these types of expenses, *see, e.g., Wahl v. Carrier Manufacturing Co. Inc.*, 511 F.2d 209, 216-17 (7th Cir.1975); *Zdunek v. Washington Metropolitan Area Transit Authority*, 100 F.R.D. 689, 692 (D.D.C.1983); *Morrison v. Alleluia Cushion Co., Inc.*, 73 F.R.D. 70 (N.D.Miss.1976). Since the Court has just cited examples on both sides of the question from the same courts, it should be apparent that there is no hard and fast rule governing awards of these costs. Instead, the governing rule seems to be the discretion of the Court. *Mikel v. Kerr*, 499 F.2d 1178, 1183 (10th Cir.1974); *Welsch v. Likens*, 68 F.R.D. 589, 595 (D.Minn.1975), *aff'd* 525 F.2d 987 (8th Cir.1975). The Court's discretion is based on the ancient practice of equity. *County of Suffolk v. Secretary of Interior*, 76 F.R.D. 469, 473 (E.D.N.Y.1977), *cert. denied*, 434 U.S. 1064, 98 S.Ct. 1238, 55 L.Ed.2d 764 (1978). In equity, the Court is empowered to do what should be done to set things right. In consideration of the unique situation of this matter, as set out in the introduction to this section, the Court finds good cause to exercise its equitable discretion to tax these costs against the defendants.

D. *Attorneys' Fees*

The Court next examines plaintiffs' request for attorney fees. It has been established beyond contraven-

tion that the American Rule is that a prevailing litigant is not normally entitled to collect attorney fees from the loser. *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 247, 95 S.Ct. 1612, 1616, 44 L.Ed.2d 141 (1975). The Supreme Court has made clear that this is not only the prevailing rule, but it is a rule to which the courts should not make exceptions without "legislative guidance." *Id.; Christiansburg Garment Co. v. Equal Employment Opportunity Commission*, 434 U.S. 412, 415, 98 S.Ct. 694, 697, 54 L.Ed.2d 648 (1978).

There are a few established exceptions to this rule, which are also universally recognized. The most common exception is that attorney fees are awardable when Congress has specifically authorized the award by statute, or they are otherwise awardable pursuant to contract or agreement. *Runyon v. McCrary*, 427 U.S. 160, 185, 96 S.Ct. 2586, 2601, 49 L.Ed.2d 415 (1976); *Paramount Pictures Corp. v. Thompson Theatres, Inc.*, 621 F.2d 1088, 1091 (10th Cir.1980). They can also be awarded when the losing party brought or defended the action in bad faith or vexatiously. *Rutledge v. Sunderland*, 671 F.2d 377, 382 (10th Cir.1982); *Kahan v. Rosenstiel*, 424 F.2d 161, 167 (3rd Cir.1970), *cert. denied*, 398 U.S. 950, 90 S.Ct. 1870, 26 L.Ed.2d 290 (1970). None of these exceptions apply here.

There is also discussion suggesting that this rule may not apply in a diversity case. *Alyeska Pipeline*, 421 U.S. at 259, n. 31, 95 S.Ct. at 1622 n. 31. This exception is fashioned to allow enforcement of a state law which reflects a "substantial policy of the state." *Id.* Although the diversity issue was raised here, Kansas has no such state law or policy.

Plaintiffs also advance the "private attorney general" concept to support their request for fees in this instance. This theory supports awarding the prevailing parties such costs when they brought the action to benefit the

public at large and without any large financial incentive of their own. *Wilderness Society v. Morton*, 495 F.2d 1026 (D.C.Cir.1974). The application of this concept is strictly limited. It should not be used merely to jettison the traditional rule against the non-statutory award of attorneys fees to prevailing parties whenever a court determines that policy considerations support the award. *Alyeska Pipeline*, 421 U.S. at 263, 95 S.Ct. at 1624. Some Circuits have expressly rejected the "private attorney general" concept supporting an award of attorney fees, finding that *Alyeska Pipeline* preempted that theory. *Huecker v. Milburn*, 538 F.2d 1241, 1246 (6th Cir.1976); *Skehan v. Board of Trustees of Bloomsburg State College*, 538 F.2d 53, 59 (3rd Cir.1976), *cert. denied*, 429 U.S. 979, 97 S.Ct. 490, 50 L.Ed.2d 588 (1976). Construing that concept narrowly, the Court cannot find that it justifies an award of attorneys fees in this case. Plaintiffs did bring this action seeking clean water, but the water they sought to clean up was all under their own land. It cannot be said that plaintiffs brought this action without any substantial economic incentive on their own. They sought and were awarded substantial actual and punitive damages.

In its previous discussion dealing with discovery costs, the Court relied in part on the provision of Rule 54(d) of the Federal Rules of Civil Procedure to support an award of those costs to the plaintiffs. Rule 54(d) does give the Court broad discretion, but it does not encompass the award of attorney fees. The American Rule is too well established to allow the Court's discretion to be stretched that far. *Pigeaud v. McLaren*, 699 F.2d 401 (7th Cir.1983).

Having considered all exceptions to the American Rule which might possibly be applicable, the Court finds that none warrant awarding attorneys fees to plaintiffs. The Court further finds that equity does not demand that attorneys fees be awarded in this particular instance. Therefore, this portion of their motion must be denied.

E. *Experts' Fees*

The last requested item for which plaintiffs seek indemnification is their expert expenses. The general rule regarding the recovery of experts' fees is somewhat analogous to the American Rule regarding attorneys' fees: they generally are not recoverable insofar as they exceed the statutory amount authorized for witnesses in general. *Miller v. City of Mission*, 515 F.Supp. 1333, 1340 (D.Kan. 1981). However, this rule is not nearly as inflexible as the attorneys' fees rule; indeed, some courts have held that it was an abuse of discretion for the trial court *not* to award expert fees in full. *Coleman v. City of Omaha*, 714 F.2d 804, 809 (8th Cir.1983); *Roberts v. S.S. Kyriakoula D. Lemos*, 651 F.2d 201 (3d Cir.1981). Obviously, then, the award of experts' fees cannot be completely analogized to the American Rule, but requires more of a factual analysis by the Court.

The Court notes initially that case language exists which would suggest that experts' fees are never taxable. *Ramos v. Lamm*, 713 F.2d 546, 559 (10th Cir.1983). *See also Illinois v. Sangamo Construction Co.*, 657 F.2d 855, 865 (7th Cir.1981); *Bosse v. Litton Unit Handling Systems*, 646 F.2d 689, 695 (1st Cir.1981); *Jones v. Diamond*, 636 F.2d 1364, 1382 (5th Cir.1981), *overruled by International Woodworkers of America, AFL-CIO v. Champion International Corp.*, 790 F.2d 1174 (5th Cir. 1986) (recognizing three narrow exceptions to the general rule); *Ott v. Speedwriting Publishing Co.*, 518 F.2d 1143, 1149 (6th Cir.1975).

A review of caselaw in full has persuaded the Court that the law is actually broader than such language may suggest. While the general rule is that such fees are not taxable, exceptions to that rule abound. Courts are allowed to award expert fees in their equitable discretion when the expert is court appointed, or when the Court finds that the experts' testimony was crucial and indispensable to the resolution of the case. *Nebraska Public*

Power District v. Austin Power, Inc., 773 F.2d 960 (8th Cir.1985) (awarding expert fees pursuant to Federal Rule of Civil Procedure 54(d)); *Cagle v. Cox*, 87 F.R.D. 467, 471-72 (E.D.Va.1980); *Worley v. Massey-Ferguson, Inc.*, 79 F.R.D. 534, 540-41 (N.D.Miss.1978); *Welsch v. Likins*, 68 F.R.D. 589, 596-97 (D.Minn.1975), *aff'd*, 525 F.2d 987 (8th Cir.1975). *See also* 10 Wright, Miller & Kane, *Federal Pratice and Procedure: Civil 2d* § 2668. This doctrine has also been recognized in this circuit. *Bruno v. Western Electric Co.*, 618 F.Supp. 398 (D.Colo. 1985); *Keyes v. School District No. 1*, 439 F.Supp. 393 (D.Colo.1977). The Court finds the *Keyes* case especially apposite to this case. There the Court found an award of expert witness fees justified despite the usual rule because the expert's testimony was indispensable to establishing the claim and *determining the plan.*

Defendants argue to the Court that plaintiffs cannot rely on the "court-appointed expert" doctrine to justify an award of expert fees in this case because the Court expressly denied a motion by plaintiffs for a court appointed expert on February 25, 1986. Dk. no. 624. That order needs to be viewed in context. Plaintiffs' motion (Dk. no. 560) specifically sought the appointment of independent experts" or "special consultants." The Court denied that motion upon a finding that "[a]t this time, . . . plaintiffs' and defendants' experts are adequately developing the issues." The Court also reserved the right to reconsider this matter later, if necessary. The Court never found it necessary to reconsider that decision, remaining convinced that the experts active in the case were doing an adequate and sufficient job. One of those experts was Dr. Dan Raviv, "plaintiffs' expert." The Court has previously indicated both in its written opinions (*Miller*, 592 F.Supp. at 999) and in its courtroom comments, that it found Dr. Raviv to be highly credible.

When the Court initially ordered the defendants to investigate potential cleanup alternatives, it ordered them

to do so "in consultation with an expert to be designated by the plaintiffs, and possibly an additiona' independent expert to be selected by the Court. . . ." *Id.* at 1009. The later order of this Court denying plaintiffs' motion for a court appointed expert must be understood in that light; what the Court declined to do was to select the additional independent expert. The expert designated by the plaintiffs, Dr. Raviv, was involved in the remedial action phase by specific order of this Court, and his involvement was not affected by the Court's later order. In this context, it is apparent that Dr. Raviv was not only a court appointed expert, but he was no longer "plaintiffs' expert." Defendants were required by this Court to work with him in developing their plan. Defendants admit, albeit rather grudgingly, that Dr. Raviv did work with them in the development of the plan. Dk. no. 634, p. 5. This Court's own observation of the development of defendants' plans (see discussion on Remedial Action Plans *infra*,) convinces it that Dr. Raviv was involved throughout. In fact, the final plan presented to the Court by defendants was largely the result of Dr. Raviv's suggestions. Defendants suggest that Raviv's involvement was insignificant in comparison to that of "their" experts, Paul Roux and Leonard Eder. That assertion is doubtless correct, but it is immaterial to the disposition of this issue.

Therefore, as Dr. Raviv was in reality "defendants' expert" for the purpose of the remedial action phase of this case—that is, he was an expert defendants were required to and did consult in their plan development—it is not only equitable to require them to pay his fees, but it is to be expected. The Court is convinced that this case, with its unusual post-trial phase which could only benefit the defendants, is one of those unusual circumstances which case law indicates would justify the award of expert fees. The facts of the post-trial activity of this case which the Court had previously detailed clearly sug-

gest that equity would require defendants to pay for plaintiffs' expert fees for the development and review of defendants' proposed remedial action plans. But the Court finds that it is not necessary to reach the analysis of whether this case is such a case justifying the unusual award of expert fees against the losing party. Its initial opinion *required* defendants to consult an expert designated by plaintiffs during this phase. It should come as no surprise now that defendants are responsible to pay for the expert consultations which they received. The Court finds that all of Dr. Raviv's fees and expenses incurred in connection with the post-trial remedial action phase of this suit are properly taxable to the defendants.

The Court notes that plaintiffs' request for expert fees encompasses more than fees paid to Dr. Raviv. They also seek reimbursement for expenses incurred with the following "experts": Clarke Well and Equipment, Charles Wilson, Curtis Miller, and John Peck. These appear to make up less than one-fourth of their total requested expert fees, the balance all being fees billed by Dr. Raviv. The Court is not clear what role these other "experts" are alleged to have played in the development of the remedial action phase of this case. Two things are clear to the Court: their use was not initially authorized by the Court (only one expert was, and that clearly has been Dr. Raviv), and since the Court is unaware of what these "experts" even did, it cannot be said that their testimony or activity was indispensable to the resolution of this case. Therefore, the Court finds that none of their fees are properly taxable to the defendants.

Plaintiffs also have requested reimbursement for certain "lab fees" which the Court has characterized as part of their request for expert fees. Their motion does not make clear for what purpose these lab fees were incurred. If they were incurred pursuant to Dr. Raviv's work with defendants' experts in developing the plans, then they are properly taxable to the defendants. If they were not so

incurred, then they are not taxable to the defendants. Having said that, the Court is constrained to add the qualification that, if any of Dr. Raviv's fees were incurred for any reason not directly related to the development of the plan, such as testimony in support of one or more of plaintiffs collateral motions, then such fees may not be taxed to the defendants.

In summary, the Court finds that the following costs are properly taxable to the defendants: transcripts, witness fees, copying expenses, postage, long distance telephone expenses, and all fees billed by Dr. Raviv in connection with his work on defendants' development of a remedial action cleanup plan, including any lab fees related to that work. The following requested costs are not taxable to the defendants: attorneys' fees, attorneys' travel expenses, and all expert fees and lab fees not incurred pursuant to Dr. Raviv's work on defendants' development of their remedial plans. Because the Court has divided up the allowable and nonallowable expenses in a different fashion than plaintiffs did in their requests, the Court orders that plaintiffs submit within twenty days from the date of this order a revised statement of costs, itemizing all post-trial costs for which the Court has authorized recovery. This statement should include explanation or justification of the purpose for which the fees were incurred, when necessary. Should defendants have any reason within the scope of this order to object to this statement of costs, they may file their objections within ten days of the date of plaintiffs' filing.

V. REMEDIAL ACTION PLANS

Despite what the lengthy preceding portions of this ruling might suggest, the Court only now comes to the issue for which it retained jurisdiction over this matter: consideration of remedial cleanup alternatives. Because so much time has elapsed since the Court initially ordered the remedial cleanup investigation, and since so

many (mostly erroneous) assertions have been made during that time about why the Court made this order, what its intents and purposes were in doing so, and what type of cleanup was envisioned by the Court and the parties *at that time*, the Court will review the context in which this order was made before discussing the development of the case during the remedial phase.

A. *Preliminary Motions*

Before the Court can address the question of the remedial action plan, it finds once again that it must first dispose of some procedural motions. This it will do in short order.

1. *Motion to Strike the Affidavit of Elly Triegel*

As the Court has mentioned before, the "motion to strike" is a favorite in this case. The Court has typically denied such motions, assuring the parties that because this matter is being tried to the Court, it will be able to dismiss from consideration any impermissible assertions.

This motion is slightly different, though. Plaintiffs move to strike the affidavit submited by defendants because it deals only with the cleanup, and was filed well beyond the deadline imposed by the Court for filing anything regarding the plans. *See* Dk. no. 655 (Order of the Court dated April 23, 1986 imposing a deadline of May 23, 1986, for filings from either side concerning the remedial cleanup plan, and stressing that no later filings would be considered by the Court). The Court has already held plaintiffs to this order. *See* Dk. no. 668. Defendants do not deny that the affidavit was late (it was filed on July 28, 1986), nor that it deals only with the cleanup. Instead, they rather cavalierly suggest that it is clear that the deadline was not an absolute deadline, and that the Court itself did not even adhere to it (citing an irrelevant example).

The Court's order meant what it said. The affidavit was filed untimely. In the interests of fairness and impartiality it must be struck. Plaintiffs' motion is granted.

2. *Motion to Strike Status Report*

Another motion to strike. This time plaintiffs seek to strike a status report filed by defendants regarding various projects at the salt plant, on the ground that it includes information plaintiffs should have been given earlier, but were not. If plaintiffs' assertion is true, the appropriate remedy is not to strike the report. The Court need not discuss this matter further, except to cite it as yet another example indicative of the ongoing disputes between the plaintiffs and the defendants. The motion is denied.

3. *Motion to Preclude Consideration of Non-evidentiary Matters*

Defendants move for an order "precluding from consideration as evidence . . . the unsworn communication of non-parties, including letters and statements, where the non-parties have not been subject to cross examination . . ., to the extent these statements make representations of fact." Dk. no. 698, p. 1. Defendants' concern here is with the communications from state agencies which were solicited by the Court. In particular, they seem concerned with an "absurd representation" made in a June 20, 1986 letter from Big Bend. Defendants were especially concerned with their inability to cross examine the Agencies at the June 2, 1986 hearing, to which they objected at the time. Plaintiffs suggest that the defendants are being a bit schizophrenic; on the same day in which defendants filed this motion they filed another motion in which they relied in part upon the testimony of one of the agencies representatives at one of the hearings.

The Court does not find the defendants' actions as inconsistent as plaintiffs suggest. Defendants are only asking that the communications not be considered *to the*

extent that they make representations of fact. The Court certainly did not solicit the agencies comments so that it could ignore them. But the Court will not consider as evidence any representations by the agencies which goes to the disputed facts of the suit. The Court will consider their submissions solely for the reasons they were solicited: as they relate to the agencies involvement in any proposal before the Court, the agencies' administration of their own duties and responsibilities imposed by state law, and their technical review of the proposed plans from their standpoint of involvement. The Court does not see the defendants as objecting to consideration of these types of factors, and since the Court is not considering or relying on the Agencies' representations as to any disputed facts or other than as stated above, the Court concludes that it must be granting defendants motion. Therefore, upon this understanding, defendants' motion is granted.

B. *Reasons for the Remedial Cleanup Investigation Order*

On August 13, 1984, this Court issued its "final ruling" in *Miller v. Cudahy Co.*, 592 F.Supp. 976 (D.Kan. 1984). The Court found for the plaintiffs, awarded them $3,060,000.00 in actual damages, and $10,000,000.00 in punitive damages. Evidence had been received at trial in response to a Court inquiry which suggested that a cleanup of the aquifer might be technologically and scientifically feasible. The Court considered that possibility to be the preferable remedy for this matter, and therefore desired to pursue that option.

The Court finds that it would be beneficial to refer to its original Conclusions of Law, from the August 13, 1984 Opinion and Order, regarding the Court's purpose in ordering the defendants to pursue this option.

> 35. In the further exercise of its equitable jurisdiction, this Court concludes that substantial justice

would best be worked between these parties if the defendants could accomplish, at their own expense, the removal of a substantial majority of the salt from the aquifer. The removal of salt from the aquifer would settle the most significant matter in controversy between these parties, restore them to their respective positions before the nuisance was created, and prevent further biannual litigation of the matters of concern in this lawsuit. This Court has the equitable power to order the defendants to undertake such a clean-up.

36. At the present time, the Court is without sufficient knowledge or information to order the defendants to undertake any particular remedial program. Additional work by competent experts is needed to determine the existence, cost, efficacy, and feasibility of the various clean-up strategies that are or may be available to defendants. . . .

37. Were the defendants to make a conscientious, good-faith, and realistic effort to address and remedy, within a reasonable time, the pollution presently existing in the aquifer, such an effort would be extremely relevant to this Court's assessment of the defendants' state of mind and to the appropriateness of the award of punitive damages that this Court has found to be fully justified in this case. In the exercise of its broad equitable powers, this Court concludes that the ends of substantial justice would best be served by holding the final judgment as to the punitive damage award temporarily in abeyance, pending the defendants' good-faith efforts to define and remedy the pollution they have caused. The Court will retain jurisdiction over this case and the punitive damage award to the fullest extent permitted by law while the clean-up alternatives are investigated and implemented, and may activate by a final judgment the punitive damage award, in

> whole or in part, at any time that it becomes apparent that the defendants are not pursuing the clean-up effort in good faith, or at any time that it becomes apparent that any clean-up effort is impossible for either scientific or financial reasons.

Id. at 1007-1008.

Several things are worth noting regarding the Court's retention of jurisdiction during this remedial action phase. First, as paragraph 37 makes clear, the Court only retained jurisdiction over the punitive damage award. The fact that the Circuit Court has declined to review the matter until all parts of the case are final does not change the finality, in this Court, of its findings of liability and actual damages. The Court has been frustrated throughout the last half of this remedial action phase by the defendants' constant efforts to retry these issues. This Opinion has dealt with this problem previously and will not rehash it here.

Second, the Court retained jurisdiction to allow the development of a remedial action plan for equitable reasons only. The defendants have insinuated that the Court is *obligated* to remit the punitive damages *in whole* if defendants develop and implement *any* cleanup plan. This is a gross mischaracterization of the Court's order. The Order is clear (paragraph 37) that only a "conscientious, good-faith, and realistic effort" to address the problem would be considered, and that it would only be considered as "relevant to this Court's assessment of the defendants' state of mind and to the appropriateness of the award of punitive damages" that the Court had imposed. In short, an appropriate amount of punitives would be remitted only if the Court was convinced, through the development and implementation of a plan, that the defendants' goodfaith effort to clean up the aquifer which they had polluted demonstrated that the $10,000,000.00 punitive damage award was not justified.

Further, the Order is also clear that the Court retained the fullest power over the punitive damage award possible, including the power to activate the punitive damage award *in whole or in part* if it became apparent that the remedial effort was not being pursued in good faith or was not feasible. The Court most definitely did not give the defendants the option of choosing between paying the punitive damage award or implementing a cleanup plan of their choosing.

Third, the concept of a cleanup plan should be viewed in the context of what was envisioned at the time of trial. Brief testimony near the end of the trial was received in response to Court inquiry that cleaning up the aquifer might be feasible. Although this possibility was not developed in depth during the trial, it was the understanding of all sides then that such a cleanup could be accomplished in a relatively short period of time. The Court recalls a time span of five to fifteen years. Defendants suggest that the time span then considered was six to twenty years. Dk. no. 577, Vol. 1, p. 3. The difference is not important; all sides agree that the time frame contemplated then was considerably shorter than the ones considered now. In part, the much abbreviated time frame was based on a faulty belief by all sides that, if all pollution ceased, the aquifer would naturally cleanse itself in thirty years. These original time frames have proved to be off by as much as a factor of ten to twenty, as will be discussed below. When interpreting the Court's initial order, discussions of feasibility must be viewed in the light of what was understood at that time. The Court's order that the defendants make an effort to remedy the pollution "within a reasonable time," paragraph 37, must also be understood within this context.

Finally, defendants were required to proceed in good faith. Plaintiffs have suggested to this Court that almost every action which defendants have taken was not in good faith. Although the August 13, 1984 Opinion makes

clear that this Court had serious concerns about defendants' motivations and attitudes, the Court is not prepared to adopt plaintiffs' sweeping accusations. This does not mean, however, that the Court has been pleased with defendants' conduct throughout the course of this remedial action phase. The highly contentious spirit between the parties, which at times almost precluded the conduct of orderly and productive hearings, has continued unabated. Fault for this lies on both sides. But as the Court will demonstrate, the defendants' conduct in the development of the plans proposed and their aggressive use of remedial action investigation to make collateral attacks on the final judgment of this Court are all relevant to good faith, and will be so considered. The Court will now review the development of the remedial action plans which were presented to this Court in light of the reasons for which the remedial action stage of this case was originally ordered.

C. *Development of the Remedial Action Plans*

1. *200 Year Plan*

The Court's August 13, 1984 Order required the defendants to begin investigation of cleanup alternatives and to present their final report on the available cleanup alternatives within eight months. *Miller*, 592 F.Supp. at 1009. A status conference was held the following month to determine some parameters and guidelines for the conduct of the investigation, but thereafter the Court's involvement in the ongoing investigation was basically limited to granting the defendants additional time in which to present their final report. Because of this limited involvement, the Court was unprepared for the proposal which defendants filed on November 20, 1985. This "Proposed Remedial Action Plan for the Cow Creek Aquifer" was a four volume report consisting of a proposed remedial action plan and seven appendices. Dk. no. 577. For obvious reasons, the Court is forced to

summarize the report, and for purposes of the developing history of the series of plans which were to be filed, the Court can summarize this report by extracting one sentence from it: "We now know that the length of time and the costs required to remediate the Cow Creek Aquifer are much greater than previously thought." Dk. no. 577, Vol. 1, p. 2. "Much greater" indeed, for as the Court was shocked to learn, the defendants were proposing a plan whose duration was two hundred years! For the Court, which was still thinking in terms of the five to fifteen years envisioned at trial, this proposal of a plan entirely as long as the history of this nation's constitution was stunning.

In fairness to the defendants, the reason for the multiplication of plan length should be explained. The investigation revealed two aspects of the aquifer which were significantly different than originally thought. First, because the recharge rate of the aquifer was less than originally thought, *see supra* discussion on New Trial, the rate at which water may be safely withdrawn from the aquifer, as established by the Big Bend Groundwater Management District, was relatively small. Being able to withdraw less water from the aquifer increased the time it would take to clean the aquifer. Big Bend later informed the Court that it would permit the maximum rate to be exceeded for purposes of a cleanup. As it explained, damage to the aquifer by "drawdown" (excessive lowering of the water table in the aquifer due to withdrawing too much water) was significant only as it related to the inability of the aquifer water to be put to beneficial use; but in its polluted state, the water had no beneficial use.

The second way in which the aquifer differed from what was originally believed is much more significant. The defendants' investigation discovered that removal plans and indicators must be built around sodium rather than chloride. The determinative factor was the sodium

adsorption ratio [SAR], which the Court has discussed briefly earlier. *See supra* III. New Trial. An SAR reading of seven is the maximum level at which irrigation can safely proceed. The aquifer had incredibly high SAR readings, particularly in the center of the plume. The SAR levels revealed by testing were so inconsistent, both between wells and at individual wells at varying times, as to preclude giving any meaningful average or norm of SAR levels in the aquifer. Defendants' report lists the various readings at the various test wells. Dk. no. 577, Vol. 1, Part C, Attachment C-1.

What makes the SAR such a problem is that absorption of sodium onto the clay particles in the soil causes the rate of sodium removal to lag behind the rate of chloride removal. Put simply, the chlorides in the water can be removed by withdrawing the chloride-contaminated water from the aquifer and either purifying it for reinjection into the aquifer, or disposing of it to allow pure water to naturally recharge the aquifer. But once the chloride-contaminated water is removed, the chlorides are also removed. Sodium, on the other hand, attaches itself to the clay particles in the soil surrounding the aquifer. Therefore, if all of the sodium-contaminated water is theoretically removed from the aquifer, sodium will still remain in the clay. Then, when pure water recharges the aquifer, this sodium will repollute the water. One witness compared it to rinsing out a soapy sponge in a clean bucket of water: one can fully saturate the sponge and then squeeze it dry, but soap still remains. It takes two or three "squeezes" to rinse the soap out. Sodium works in a similar fashion. Defendants' experts predicted it would take two or three "rinses" to remove sufficient sodium from the aquifer to lower the SAR of the water to seven.

Because of the combination of these factors, defendants estimated that the time necessary for the aquifer to naturally clear itself was 190 to 240 years, rather than

the 20 to 30 estimated at trial. Defendants also estimated that, as a result of these factors, the costs of remedial measures to accelerate the remediation process to within less than 30 years would be between $11,000,000.00 and $34,000,000.00 in capital costs, with annual operating costs of $2,300,000.00 to $9,700,000.00. Even then, defendants ominously intoned, there was "no technical assurance or previous experience to indicate that, in practice, these systems would meet their design targets or that the theoretical acceleration in remediation time could be achieved." Dk. no. 577, Vol. 1, p. 4.

In light of these dire warnings, defendants then unveiled their plan. Briefly put, the plan involved five steps: 1) eliminate potential sources of contamination; 2) control the further spread of contamination; 3) establish an ongoing monitoring program; 4) provide fresh drinking water supplies to the affected homeowner population; and 5) compensate landowners who cannot obtain irrigation water from their land because of the salt pollution. The upshot of the proposed plan was that it only intercepted polluted water to prevent it from moving downstream. Defendants described it as being "designed to establish barrier interceptor systems across the entire plume at four locations." Dk. no. 644, p. A-1. The plan disposed of this water rather than purifying it and returning it to the aquifer. It did nothing to clean up the existing polluted areas. It was more of a "containment" plan than a cleanup plan. Defendants calculated the present value cost of this plan to be $3,456,000.00. The plan would take 200 years to implement. Because of that, this plan to be known as the "200 year plan," or, as other plans were later designed from it, the "Base plan." Testimony was also offered that it would take the aquifer 300 years to naturally clean itself.

Defendants did present various "Acceleration Alternatives" to the proposed 200 year plan. These ranged from accelerating the cleanup to 67 years, at an *added*

present value cost of $1,686,000.00, to accelerating the cleanup to 5 years, at an *added* present value cost of $71,030,000.00. Defendants compared these costs to the differential market value of the land in its non-irrigable state and, not surprisingly, recommended that none of the accelerated alternatives be imposed. Instead, they recommended a one-time compensation to the landowners for their inability to irrigate.

It would be an understatement to say that defendants' proposed 200 year plan did not receive a warm reception. Plaintiffs filed a lengthy "Observations and Objections to the Cleanup Plan," Dk. no. 590. Therein they objected that this plan did not address the issue of providing fresh water to the plaintiffs, protesting that they needed salt removed from the water, not water removed because it was salty. They objected because this plan would significantly reduce the water flowing towards them, thereby providing even less water to flush out the pollution below plaintiffs' lands. They characterized the plan as not a cleanup, but merely a proposal to change an underground polluted stream into an underground polluted, stagnant lake. Finally, plaintiffs objected, as did the Court, to defendants' presuming to substitute their own standards of damages for the Court's, via their proposal to pay plaintiffs, the differential of the value of non-irrigable land to irrigable land. Presumably, this was tied with defendants' suggestion that the ten million punitive damages award be replaced by the three million dollar plan, plus this differential; a proposition which the defendants would no doubt prefer.

The hearing held on this proposal on January 16 and 17, 1986, further underscored the hostile reaction to this 200 year plan. Plaintiffs may be forgiven for their bitter sarcasm at that hearing. The Court itself questioned whether anything which would take 200 years could realistically be called a "plan." Plaintiffs' expert, Dr. Dan Raviv, suggested the cleanup be approached solely from

the view of cleaning up chlorides to an acceptable 250 ppm level, and suggested the placement of additional wells. Defendants' experts, Mr. Leonard Eder and Mr. Paul Roux, informed the Court that the Base plan, if operated solely to clean up chlorides rather than being concerned with sodium, could reduce the chloride level in the aquifer to 250 ppm within 100 years. This became known as the "100 year plan." Roux and Eder further agreed to work with Raviv on his additional wells proposal, and requested thirty days to do so. Another hearing was set for February.

2. *February Modifications to the Plan*

Another hearing was held February 18 through 21, 1986. Defendants presented their modifications to the Base plan to incorporate the chlorides-only approach. They first informed the Court that their data suggested it would take the aquifer 180 years to naturally clear itself to the maximum acceptable chloride concentration of 250 ppm.

Defendants presented two modifications to the plans. The first modification reduced the total remediation time by fifty percent at an additional cost of only ten percent above the Base plan (here, the Base plan refers to the 100 year plan, not the 200 year plan, since sodium was not being considered). This first modification will be referred to as the "50 year plan." The reduction in remediation time was accomplished by "moving wells" as certain areas cleared; that is, reducing the pumping volume of wells in certain areas and drilling new wells in other areas to increase the rapidity of their cleanup, all the while staying within the maximum pumping rate from the aquifer that the drawdown and recharge rate would allow. The plan estimated that the first phase of cleanup would last 15 years, and thereafter wells could be "moved" or newly drilled to the other areas for a second phase, estimated to take 35 years. During this

phase, pumping would continue in the original areas, but at a reduced rate. This plan was now the "recommended plan" by American Salt; and although there were more plans to come, it would remain their recommended plan throughout the duration of the remedial action hearings.

The second modification provided further acceleration of the remedial plan by adding an additional well immediately into the area where the new wells would be drilled in the second phase of the 50 year plan. The plan would then proceed largely as the 50 year plan would, but because of the additional well, the cleanup time for the second phase would be reduced from 35 to 17 years, creating a total estimated cleanup time of 32 years. Defendants and their experts did not recommend the "32 year plan" because of their concern that its accelerated pumping "would probably stress the aquifer and cause significant drawdowns in some areas and may change Cow Creek from a gaining to a losing stream." Dk. no. 644, p. C-1. It was also not recommended because the cost/benefit ratio was considered unacceptable. They characterized this plan as an aggressive, risky plan. Defendants did find the 32 year plan acceptable from an environmental and technical standpoint.

Defendants also presented to the Court their calculations of the various plans' costs, in present value. The 100 year plan was estimated to cost $3.455 million, the 50 year plan to cost $3.717 million, and the 32 year plan $4.489 million. Costs were represented to be accurate only within ten percent. The lengths of the plans were also represented to be only estimates, which could vary considerably once actually put into effect.

Defendants apparently developed these two modifications on the very eve of the hearing. Plaintiffs complained that they were unprepared to adequately address these plans because defendants had told them as recently

as the Friday before the Tuesday hearing that they were still recommending the Base plan. Defendants' experts admitted that the two modifications were pulled together over the weekend, portions of them as late as Monday evening. They testified that this was done because defendants' attorneys were reluctant to stick with the Base plan, due to their feeling that the Court had been "disappointed" with the time span. The Court was concerned about the potential last minute sandbagging of the plaintiffs by this surprise move, but over the course of the highly contentious four day hearing grew less concerned that plaintiffs were actually harmed by defendants' midnight hour strategy. However, the timing of this did raise some concerns in the Court's mind regarding defendants' "good faith."

In the course of the hearing Ron Nugent, President of American Salt, testified that the company was committed to a cleanup regardless of the outcome of the suit. In response to the Court's question, he assured the Court that he spoke not only for American Salt, but was authorized to speak for the parent company as well.

Plaintiffs' expert, Dr. Dan Raviv, presented his evaluation of the plans to the Court. Raviv expressed some concerns with defendants' plans, and detailed a few shortcomings he saw. He testified that he was surprised to show up in court and see the 32 year plan presented, but he found that plan very positive. Raviv sketched out a few modifications he would suggest to the 32 year plan. Roux and Eder requested an additional thirty-five to forty days to review these with him, and then present the modification to the Court. Another hearing was set for April.

3. *The Ten Interceptor Well Plan*

On April 14, 1986, one week before the next scheduled status conference, defendants filed a detailed description of the "Ten Interceptor Well Plan." Dk. no. 644. This

plan was presented in written form with detailed descriptions and supporting data (similar to the defendants' original Base plan and unlike the 50 year plan and the 32 year plan, which were prepared overnight). This plan is in essence a modified 32 year plan. Although defendants' experts prepared and presented this plan, it was the product of Raviv's suggestions made at the February hearing. Defendants represented this plan to be environmentally sound and technically feasible, but not cost effective. Therefore, they did not and do not recommend this plan; their recommendation continued to be the 50 year plan.

This plan still addressed only the necessary remedial action to reduce chlorides to 250 ppm, and did not address the sodium problem. The major change in this plan was that a larger number of lower volume wells is used. Separate provisions for potable water were still included, since this plan, like all of the plans, is most accurately characterized as a modification of the Base plan. Defendants estimated that the cost of this plan would be $4.8 million. Costs for the 100 year, 50 year, and 32 year plans were revised.

Throughout the course of the hearings, state agencies who had oversight responsibility for the water in the aquifer and/or the pollution there had attended and closely monitored the progress of the plans. These agencies were the Kansas Department of Health and Environment [KDHE], the Big Bend Groundwater Management District [Big Bend] and the Kansas State Board of Agriculture's Division of Water Resources [DWR] [hereinafter collectively referred to as the Agencies]. The Court was aware and appreciative of the Agencies attentiveness, and had invited them to inform the Court in writing of their reactions to the proposal that defendants would file. On the day of the status conference, both KDHE and Big Bend, as well as the plaintiffs and their

expert Raviv, presented the Court with written reactions to the Ten Interceptor Well Plan.

The status conference was held on April 21, 1986. Defendants' experts, Roux and Eder, presented the Ten Interceptor Well Plan and the 50 year plan in detail, explaining how they would work. Roux represented that there were only three areas of major disagreement remaining between the experts: the question of whether the 50 year plan or the Ten Interceptor Well Plan was better, disagreements over who should monitor and administer the remedial cleanup, and technical dispute over a disposal well. Defendants estimated that the Ten Interceptor Well Plan would take 35 to 50 years to complete.

In his written comments and in his testimony, Raviv expressed various technical concerns and administrative, reporting recommendations. Defendants had recommended that KDHE administer the plan. Raviv objected to the term "administer" and requested guidelines from the Court as to who would oversee and control the operation of the remedial action. He also objected to the defendants' calculation of the cost of the Ten Interceptor Well Plan. Defendants represented that, of the $4.8 million figure they projected, $1.713 million had already been spent. Raviv protested that the figure of monies already spent included costs for site investigation and some plant modification; expenses which were not relevant to the remedial action.

In its review of the Ten Interceptor Well Plan, KDHE initially presented to the Court the state's interest in the cleanup of the polluter aquifer, noting that "[g]roundwater in Kansas represents a limited and valuable resource to the State." Dk. no. 648, p. 1. It voiced an initial concern that, while the 250 ppm chloride standard adopted by the parties was satisfactory, attention should also be given to the sodium content. KDHE suggested

that sodium should be monitored, and desired to see the sodium content lowered to a maximum of 100 ppm. It further provided a valuable technical critique of plan particulars. Concern was also expressed about sources of continuing pollution, especially from the settling pond in the brine fields. The Court had found the brine fields to be a source of pollution in its August 13, 1984 opinion, but the defendants had stoutly contested that finding throughout the course of the remedial hearings. While KDHE was the state agency with primary responsibility for a pollution problem such as this one, it made clear its desire to cooperate with the Court as fully as possible: "KDHE does not want, in the interest of environmental protection, to initiate any unilateral actions which could conflict with the Court's orders. To achieve this objective, KDHE is willing to supervise the cleanup plan, to require modifications as warranted, and to institute such enforcement actions as necessary." Dk. no. 648, p. 6.

Big Bend's comments to the Court were more in the nature of expressions of concern by local people involved with water management than a technical review. Big Bend was concerned with who would evaluate the results of monitoring to determine if the plan was working, or if it needed modifications. It asked the Court to retain jurisdiction over any cleanup, something the Court was unwilling to do due to the length of any proposed plan. Big Bend also was concerned that American Salt understand that its interceptor well at the edge of its property, which was designed to intercept any brine in the aquifer before it went onto private property, was not "a license to continue to pollute the aquifer beneath their property." Dk. no. 649, p. 1.

While Dr. Raviv, plaintiffs' expert, was increasingly concurring in the direction defendants' plans were taking, the plaintiffs were not so content. In their written comments to the Court, they expressed their frustration

with defendants' ever changing representations of what they were willing to do, while nothing productive was happening. They did have concerns with the Ten Interceptor Well Plan, mostly related to monitoring and administration. They were understandably concerned about defendants being solely in charge of the administration of any plan, and asked that an independent body be appointed. In the final analysis, though, plaintiffs were frustrated with the continual delays and the increasing complexity of any remedial action. They were beginning to favor asking the Court to abandon any attempt at a Court-ordered cleanup and to just enter final judgment, a change from their original position.

4. *Finalization of the Proposed Remedial Action Plan*

At this point, the Court finally had before it a detailed plan which seemed feasible and which had a chance of being acceptable to all sides. The Court had several remaining concerns with the proposed Ten Interceptor Well Plan, though. Like KDHE, the Court was concerned about ignoring the sodium factor. This was being done at plaintiffs' suggestion, but the Court had not expressed its approval of that development; a cleanup that leaves considerable sodium pollution is not a cleanup. But the Court did not view this as a major impediment to plan development; earlier testimony had indicated that the remedial action to clean up the chlorides could also clean up sodium, although it might take longer.

This raised a second concern to the Court. When this remedial phase of the case was initially embarked upon, all sides envisioned that a cleanup could occur within approximately five to fifteen years. Had the Court known then that any cleanup would take decades (if not centuries), it is highly unlikely that this phase would have been embarked upon. Since the Court now found itself in the midst of plan development, it was willing to pro-

ceed to the finish in the hopes of arriving at a practical solution. But it was becoming increasingly apparent to the Court that *any* remedial cleanup could not occur under the jurisdiction of the Court. Courts are not functionally capable of overseeing something of such duration. Therefore, the Court was increasingly devoting its attention to the question of what or who would administer and oversee any remedial action. In comments received on the Ten Interceptor Well Plan, plaintiffs, Big Bend, Dr. Raviv and KDHE had all addressed this issue.

Before the Court addressed this issue, though, it decided to determine if the proposed Ten Interceptor Well Plan was in fact technically feasible. If not, the other questions evaporated; if so, they could then be addressed. The Agencies had submitted written comments to the Court on the proposed plan, but had all indicated that the brevity of time had precluded a full technical review. The Court therefore requested that the Agencies compare and fully review the Ten Interceptor Well Plan and the 50 year plan for practicality and feasibility. The Court did not presume to exercise any jurisdiction over these Agencies, and therefore did not order them to do so, but only requested them to conduct such a review if they were willing. The Court did order defendants to provide the Agencies with all necessary data to make such a review. A hearing was scheduled for June, at which time the Court instructed the parties that it and not the attorneys would ask the questions. The Court brushed aside "due process" protests to this by informing the parties that, in its opinion, this ten year old case had been "due processed to death." Although the Court had originally indicated that it would allow the attorneys to cross examine the representatives of the Agencies as they presented their reviews at that hearing, the Court later changed its mind and instructed all sides that since the Agencies were merely following their state regulatory responsibilities, and were presenting their reviews at the

bequest of the Court, inquiry would be made only by the Court.

The Court received the Agencies' written reviews the last week of May, and the hearing was held on June 2, 1986. The Agencies found both plans to be feasible, but because the Ten Interceptor Well Plan allowed for accelerated cleanup without significant drawdown to the aquifer, and because it gave immediate attention to all areas of the plume, they recommended the Ten Interceptor Well Plan over the 50 year plan. Other technical suggestions were made, but a KDHE explained, there was little purpose in fine tuning the plans further due to the inherent uncertainties in any undertaking of this nature.

Two significant concerns, paralleling the Court's concerns, were also expressed. The sodium pollution in the aquifer continued to concern the Agencies, but they suggested that monitoring for both chlorides and sodium and administering the plan accordingly could resolve that problem. The administration itself was the other concern. Suggestions were made for independent monitoring. Big Bend suggested the formal creation of a decision-making task force composed of representatives from Big Bend, KDHE, DWR, the affected landowners and American Salt. This mirrored exactly the Court's thinking on this issue.

The Court conducted a hearing on June 2, 1986, at which the parties and the state agencies answered questions put to them from the bench. No formal presentation of evidence, receipt of testimony, or conduct of examinations and cross-examinations by the parties were allowed. Because the plaintiffs had expressed increasing frustration with the development of the plans, the Court first inquired of them whether they still wanted the aquifer cleaned up as a part of the judgment. Plaintiffs represented that they did, but they wanted it to happen

within fifteen years as originally envisioned. They complained that within 35 to 50 years they would all be dead, and as one landowner had earlier said, "I don't consider any cleanup that doesn't happen in my lifetime to be a cleanup." The plaintiffs were also concerned because the indications were that American Salt was still polluting the environment with salt. Any cleanup effort was worthless as long as that continued, because no progress could be made. So, while they still favored a cleanup, at least in a theoretical sense, they were growing increasingly skeptical.

Their concerns about the protracted nature of these proceedings while nothing constructive was happening (concerns shared by the Court) were not helped by the defendants' opening comments that they were prepared to implement whatever plan the Court ordered "subject to its appeal rights and perhaps a stay pending it." Transcript of June 2, 1986 hearing, p. 10. This suggestion of a stay of cleanup pending appeal(s) did not assure the Court that defendants' earlier representations of their willingness to clean up the aquifer "regardless of the outcome of the suit" were in good faith.

The plaintiffs raised the issue of being compensated for the monitor and intercept wells that would be placed on their property, much as payments are made for similar oil lease wells. They also wanted guarantees of damage payments in case these wells leaked, or if their land were otherwise damaged due to the presence and servicing of the wells.

This again raised the issue of plan administration. An entity was needed which could not only authorize modifications in the ongoing remedial action, but could also authorize payments from the funds which the Court would require defendants to post as a financial guarantee that the plan could be completed. Already, disagreements had arisen over what expenses should be considered as costs

of the remediation as opposed to expenses which American Salt should have to pay as a natural part of their plant operation (see Dr. Raviv's comments on the estimated cost of the Ten Interceptor Well Plan, *supra*). Such an entity would also have to serve as a "referee" between the salt company and the landowners for disputes that would inevitably arise. KDHE represented to the Court that, while it was willing to receive input from such an entity, it was reluctant for policy reasons to sit on any board that made decisions about allocating funds. While it understood that any order the Court would make would specifically reserve to the Agencies their full statutory authority, it preferred to avoid any financial responsibility and stay solely with its regulatory authority. Big Bend was willing to designate someone to set on such a board, but DWR, after initially expressing its willingness, decided that KDHE's position was a more realistic one for them. Plaintiffs informed the Court that if American Salt was in control of administration, they would prefer to forget the plan entirely and to take the judgment; they had encountered too many problems in dealing with American Salt in the past to want to face it for another 35 to 50 years.

This issue, then, had developed into a major stumbling block to the implementation of any plan. Because the issue was a new one, the Court again ordered the parties, and requested the Agencies, to brief it regarding their suggestions as to oversight of a remedial action cleanup plan. The Court explained the problem in its order of May 6, 1986:

> Specifically, the Court is concerned about oversight of a remedial action cleanup plan which has gone through a receding time span, but which by the most optimistic projections will still take a third of a century to complete. The Court has said in the past, and reaffirms now, that continuing jurisdiction in the United States District Court for the District of

Kansas is not the solution, is judicially unsupportable, and will not be considered. Yet the Court easily discerns that ongoing problems will develop should a plan be ordered and implemented, and the Court recognizes that a mechanism for resolving such disputes *must* exist. Should no clear, defined and effective dispute resolution mechanism exist, one which all sides agree should govern the ongoing operations and is acceptable to the Court, this Court is convinced that ordering a cleanup would be a futile effort. In such a case, the Court would not order that a cleanup plan be implemented.

Such a mechanism should be empowered to approve modifications or changes in the plan as technical or environmental developments may dictate. It should be entrusted with financial oversight to approve expenditures from funds bonded for the cleanup operation. It should be capable of satisfactorily resolving any disputes that may arise, such as disputes between the landowners on whose property drilling must occur and the engineering or drilling firms who engage in the mechanics of a cleanup operation. Additionally, the Court believes that it should have input from the affected landowners, the salt company, and all of the affected state regulatory agencies. This would provide it with both a balanced approach and with the technical input needed to make the necessary decisions regarding the cleanup. Finally, and in the Court's opinion most importantly, it should not be controlled by either the salt company, the landowners, or the operators who do the work necessary for cleanup. Although participation by all of these may be, and probably is, essential; allowing any one of them to control the ongoing oversight would destroy the necessary impartiality that an equitable solution to this matter requires.

Unfortunately, the Court discovered during the course of the June 2 hearing that a Pandora's box

> of problems was opened by the discussion of this phase of any cleanup operation. At the outset, the Court would state unequivocally that it disagrees with defendants' representations that this is a "non-problem." The course of this case and the nature of the undertaking clearly show that someone or something must exist which can neutrally control the cleanup's development and address disputes and disagreements which will inevitably arise. The Court learned on June 2 that the construction of this "someone or something" was not a simple matter. The state agencies, with the exception of [Big Bend], were reluctant to be involved in such oversight that would be separate from their legally imposed regulatory responsibilities. . . . Plaintiffs expressed opposition to involvement by American Salt in any fashion. American Salt, conversely, was opposed to surrendering control of any mechanism that would impact their plant operations. In short, nothing approaching consensus developed at the hearing in this regard. As has already been said, the Court is persuaded that its approval of a remedial action cleanup plan without some form of a neutral oversight entity would be an empty gesture. In light of the extensive time that has been devoted to this matter, the Court would regret to see it collapse at this late date. Therefore, this final attempt is made to resolve the problem.

Dk. no. 674.

Simultaneous filings were ordered from the parties and the Agencies. Plaintiffs suggested an entity similar to the one which the Court had proposed, but were somewhat stymied by the refusal of the Agencies to participate. They suggested that an independent arbitration panel could be used. Defendants suggested that KDHE, as the regulatory agency in the state with oversight in this area, should be given full authority to conduct any remedial action. They also suggested independent ar-

bitrators for settling any other disputes, and suggested that, "the histrionics of plaintiffs' counsel" notwithstanding, the company and most of the landowners had been able to satisfactorily resolve problems themselves throughout the course of this phase. Dk. no. 679, p. 13. A written arbitration agreement was proposed. Big Bend indicated its willingness to oversee both technical and financial aspects of the remediation process. Both DWR and KDHE restated their statutory authority, but demurred from being involved in any financial or dispute resolution decisions.

The Court had previously shut off future filings from the parties regarding the proposed plans. With the receipt of the above comments, the Court's file was therefore complete, and it took the matter of remedial action under advisement.

D. *Court's Analysis of the Proposed Remedial Action Plan*

Attempts by the Judges of this District to impose equitable remedies going beyond the mere award of money have met with criticism. *See* Note, *Remedial Activism: Judicial Bargaining with Punitive Damage Awards*, 19 Loy.L.A.L.Rev. 941 (1986); Note, *Civil Procedure—Remittitur of Punitive Damages in Exchange for Product Recall*, 34 U.Kan.L.Rev. 823 (1986). Nonetheless, this Court remains convinced that what it attempted to do in this case was appropriate. *Miller* was a trial to the Court, not to a jury, so no seventh amendment questions were involved. The remedial action required by the Court was not a modification of the initial judgment in the case, but a part of that judgment. The actions proposed by the Court, by which the defendants potentially might obtain some relief from the punitive damages, would have required significant effort and a considerable expenditure of funds which would be comparable to the punitive damages. Moreover, the actions proposed went

to the nature of relief plaintiffs were seeking, and were consistent with the relief requested. Significantly, plaintiffs themselves favored this attempt—the proposal was not made over their objections but with their support. In light of these factors, it made sense for the Court to attempt to fashion a remedy which truly rectified the wrong, not merely compensated for it.

While the plaintiffs did support this proposal (the Court would not have pursued it without their support), it should be remembered that it was the Court itself which initially suggested the remedial cleanup. This Court desired to see a remedy fashioned which would, as much as possible, restore the environment to its pre-polluted state. It was willing, even eager, to use its equitable powers to bring about that result. This remedial action phase was not envisioned or embarked upon to trick defendants or to delay plaintiffs' recovery; it was done because the Court was willing to try to use its powers to right the wrong.

And the Court has tried. It has assiduously and conscientiously exerted every judicial effort. It has put as much effort into the post-trial phase of this case as it did in the pre-trial phase. It has read thousands of pages of documents and sat through endless hours of hearings in an attempt to reach the final goal of a feasible, Court-ordered remedial cleanup plan. It has constantly gone back to the parties (and the Agencies) to try one more time to work out the problems which prevented it from ordering a cleanup. And it has spent a considerable amount of time inchambers studying the submissions and discussing numerous alternatives with its staff in an attempt to find a workable solution. But the Court has concluded that, for this matter, no feasible court implemented cleanup plan can be found. Therefore, the Court now sadly abandons its attempt to fashion an equitable remedy and rejects all proposed plans.

The Court finds several problems with the proposals before it. First, they do not address the sodium pollution in the aquifer. It has clearly been established throughout the course of these hearings that the maximum sodium content at which water is fit for irrigation is far below the sodium level in this aquifer. It has also been clearly established that a sodium cleanup will take substantially longer than a chloride cleanup. The proposals for cleaning up chlorides are also technically sufficient to clean up sodium. But the plans must be operated significantly longer to clean up the sodium than they would need to be if only chlorides were cleaned up. This is why the Court, although not approving of the plaintiffs' suggestion to disregard sodium in a cleanup calculation, nevertheless allowed the plan developments to proceed; the Court knew that all plans were technically capable of removing both compounds from the water, and decided in the interest of keeping the controversy at the hearings to a minimum not to interfere with the parties' accommodation in this matter. Then, after an acceptable plan was developed, if ever, the sodium could be factored back in to determine a true plan length.

But when sodium is factored back in to the plans now before the Court, the time length arrived at is astounding. The chief problem with sodium is not that the plans are incapable of cleaning it up, it is that the plans will require a great amount of time to do so. Thus, the Ten Interceptor Well Plan, the favored plan before the Court, must be viewed not in terms of the 35-50 years suggested, but more in terms of 75-150 years. Even 35 years is too long for a Court to oversee remedial action; but when the plans are viewed in terms of what would really be required to effectuate a cleanup of the pollution, the length of time clearly becomes impossible.

It should not be thought that the Court is adverse to retaining jurisdiction to oversee implementation of remedial action. Recently, while this Opinion was being

drafted, the Court ordered a remedial plan to be developed and implemented under its supervision in another matter. *Reece v. Gragg*, 650 F.Supp. 1297 (D.Kan.1986) (county jail facility found unconstitutional, continued operation allowed only upon certain enumerated conditions, including the development by the county of an acceptable proposal to bring its jail facilities within constitutional parameters). The Court is at this very moment overseeing the development of that plan.

But a remedial action of the type envisioned in *Reece*, or of the type originally envisioned in this case, is not of such a long duration that it cannot effectively be managed by the Court. *Reece* at the longest should not involve this Court for over three years. When the Court embarked upon this adventure, it expected that a cleanup could be accomplished in five years. But a proposal which will, at a minimum, take 35-50 years, and in all probability two to three times as long, is a horse of a different color. No judicial precedent exists for retaining jurisdiction over a case for that length of time. Common sense dictates against it. The prospect of the Court attempting to oversee a matter of this duration is frightening. Even were he a much younger man, and had hopes of surviving the course of such a proposal, the Court would cringe at the specter of ongoing oversight of a matter predicted to last that long. Indeed, it is doubtful that retaining jurisdiction for that length of time can be legally supported. In this age of burgeoning and complex litigation, courts are not equipped to exercise continuing judicial supervision for decades. Litigation was not meant to be passed from one judge to other, succeeding, judges over long periods of time.

Therefore, the Court was required to look beyond itself for an administrative oversight authority. This is where the second problem arises. KDHE was willing to provide technical oversight but no acceptable proposal for financial oversight could be developed. The rationale behind a

court-ordered cleanup plan was that defendants could obtain some relief from the punitive damages for it. But if the Court were to give any credit to the defendants against the punitive damages, it would require defendants to bond the cost of the remedial action plan initially. Once funds were bonded, the cost of the cleanup could be paid from them. But who would determine what was properly payable from the bonded monies as opposed to from the coffers of American Salt? Already, disputes have arisen over what costs are properly allocable to the plan, with plaintiffs' expert opposing defendants' attempt to charge nearly two million dollars of expenses already incurred against the plan cost. It does not take a crystal ball to see that disputes of this nature would be likely to continue to rise. In its order of May 6, 1986, quoted above, the Court explained that ordering the implementation of a plan without resolving this question would be futile. Unfortunately, the question was never resolved.

Defendants have never understood the importance of this factor to a Court-ordered plan. They asserted that KDHE could simply administer the entire thing. Indeed, it should be mentioned at this point that, only one month ago, KDHE, pursuant to its statutory responsibilities, entered into a signed agreement with American Salt and its parent corporation, AMS Industries, Inc. (formerly Cudahy Company), requiring a cleanup of the aquifer along the lines of the Ten Interceptor Well Plan proposed to this Court. The Court would not wish to belittle the importance of this agreement. By signing it, defendants have made significant admissions, particularly in paragraph 9 of the Findings of Fact which reads in part: "[t]his pollution has been caused substantially by the operations of the Lyons Plant by American Salt, AMS, and their predecessors in interest at various times since 1908." The Court does not foresee that KDHE's administration of this consent order will encounter the same difficulties that concerned the Court. The technical

concerns in an undertaking of this nature are myriad, and as the cleanup plan is developed and implemented those concerns are sure to multiply. An administrative agency such as KDHE is designed to handle such a situation, while it would be at best difficult for a judicial body to deal with it. More importantly, KDHE has ordered this cleanup solely out of environmental concerns. It is not concerned with offsetting punitive damages, so it does not need to worry about which plan costs should be setoff from a sum certain. It merely requires American Salt to pay for all cleanup costs of whatever nature, and requires AMS to guarantee payment of these expenses in the event that American Salt does not or cannot pay them. Its task is accordingly much simpler than the Court's self-imposed task would have been.

The Court wishes to make clear that KDHE's implementation of this order was neither a surprise to the Court nor a unilateral action taken by it against the Court's wishes. As this Opinion has explained earlier, throughout the remedial phase of this case—a phase which KDHE has closely followed—KDHE has consistently assured the Court that it did not wish to interfere or preempt the Court's actions in any way. From the conversations that the Court had with KDHE, it appeared that KDHE would have issued such an order earlier than it did had it not been stepping aside out of respect to this Court's continuing jurisdiction in the matter. It appears that such a sweeping order was not entered into years ago in part because KDHE did not discover the full extent of the problem until the trial in this case revealed it. But after being apprised of the facts of the pollution, it has been ready to take action.

After the filings and hearing were concluded in this matter, KDHE informed the Court that it had decided that the Ten Interceptor Well Plan best addressed the pollution problem. It then privately notified the Court that it wished to enter an order along those lines under

its own authority as the state agency with jurisdiction over environmental matters. But it also informed the Court that it would delay entering such an order if requested to do so by the Court. Because this Court has not wanted to appear to be exercising any jurisdiction over the state agencies, and because it was clear by then to the Court that, if the other details could be worked out and any plan were implemented, it would be the Ten Interceptor Well Plan, the Court did not ask KDHE to refrain from action. It is important to understand that the Court did not ask KDHE to act either. KDHE operated independently and with deference to this Court.

In light of KDHE's actions, defendants can be expected to ask the Court to merely incorporate KDHE's order as its own. But, as explained, the Court has concerns not addressed by KDHE's order. That a state regulatory agency, on its own initiative and under its own authority, takes such action does not resolve the matter before this Court. The Court therefore is unable to simply incorporate KDHE's order as its own.

Although defendants' agreement with KDHE is technically outside the scope of this suit, the question nonetheless arises whether their agreement with KDHE to clean up the aquifer does not call for some relief from the punitive damages award. The Court has seriously considered this question, separate and apart from the context of this case. The Court fully expects defendants to argue that since they have agreed to do in essence what the Court originally sought to have done—clean up the aquifier—the Court is *obligated* to remit the ten million dollar punitive award. The Court is not so obligated. As should be clear to all, and as defendants themselves have admitted, KDHE had the authority to do exactly what it has done even if the remedial phase of this case had never been embarked upon, indeed, even if this case had never been filed. *See* Transcript of June

2, 1986 hearing, p. 52. Frankly, the Court is pleased that state regulatory action is being taken that may result in the cleanup of the salt pollution. While one might question whether American Salt would have been so willing to enter into such a consent order absent the pressures resulting from this case, the Court will attribute at least some good intent to it on this account.

But the relationship of a 1987 consent order to a 1984 award of punitive damages is tenuous at best. An elementary aspect of punitive damages seems to have been forgotten in this case: they are awarded on account of *past* behavior. If punitive damage awards could be remitted solely due to subsequent conduct, no punitive damages would ever be enforced in any case. Defendants would simply engage in ameliorative behavior until their conduct was deemed sufficient to vacate an award. It does not require a review of the law of punitive damages to show the error of this analysis. Defendants' conduct may serve to relieve them from future liability for similar offenses, but it does not require that an award based on their past offenses must be set aside.

The Court took the unusual step here of promising to consider remitting the punitive damage award in whole or in part upon the fulfillment of certain conditions by defendants, but they have wholly failed to meet those conditions. They may not substitute their own criteria for the Court's assessment in this matter. That KDHE may have borrowed from the discoveries and developments in this case is purely fortuitous. KDHE made its order out of environmental concerns, but the Court addresses an unrelated question in its determination of whether the punitive damage award is appropriate. That question involves the Court's assessment of defendants' state of mind as determined by their good faith conduct in developing and implementing a remedial action plan. *See Miller*, Conclusion of Law ¶ 37,592 F.

Supp. at 1007 (also quoted above in this Opinion). The Court now turns to that assessment.

This assessment addresses two issues: its relationship to the feasibility of a Court-ordered plan and its relationship to the question of whether the punitive damage award is appropriate. As to plan implementation, any remittance of punitive damages in consideration of a Court-ordered plan would require cooperation between plaintiffs and defendants in the ongoing oversight of the plan's implementation. That the two sides have never gotten along will come as no surprise to anyone who is acquainted even slightly with this matter. Like a weary parent, the Court has continued to hope that an agreement eventually could be reached. Perhaps the Court was naive, for if there has been one constant throughout this case, it has been the contentious spirit of the parties. From the first threat of filing this action (where defendants threatened plaintiffs that, if suit were filed, defendants' attorneys would drag the matter out until plaintiffs were broke and defendants owned their land), to the closing of the last remedial hearing (where both defendants and plaintiffs intimated that they would oppose any plan administration which gave *any* role to the other side), the drama of this case has resembled the Hatfields' and McCoys' dispute.

Defendants have suggested that it is the counsel for both sides who are feuding, the parties themselves largely are cooperative. The Court would like to believe this, but it has seen no indication of such harmony. Instead, to cite only one example, it sees incidents like the one occurring on June 18, 1986. On that day, according to letters the Court received from both sides, plaintiffs appeared at the American Salt plant for a prearranged inspection of the plant premise for buried salt. This inspection was arranged as a result of a matter raised by plaintiffs at the February 21, 1986 hearing; it was part

of a compromise by which plaintiffs agreed to drop a motion for injunctive relief. Plaintiffs were represented at that inspection by both Cecil Miller and by a law clerk from plaintiffs' attorneys' office. Defendants objected that the arrangement allowed for only *one* representative of the plaintiffs to make the inspection, and hard as it is to believe, the tour was delayed for forty-five minutes while this insignificant matter of "one inspector or two" was hotly debated. The law clerk was finally sent away, and Miller alone conducted the inspection. American Salt allowed a representative of KDHE to accompany them, but also prevented a representative of Big Bend from taking the tour, saying a Court order would be required before Big Bend could participate in the inspection.

The law clerk left the premises and went to Miller's land which adjoined the salt plant to take photographs. In doing so, he apparently overstepped the property line onto American Salt's land. The plant manager himself gave chase to the clerk, and when he could not apprehend him, had his secretary call the county sheriff's office to arrest the clerk for trespass. He was so arrested, and given Miranda warnings before he was released. In light of such incidents, it is difficult for the Court to believe that plaintiffs and defendants are coexisting and working together peaceably.

Although, as in any quarrel, fault probably lies on both sides, from the Court's observations it must conclude that the lion's share of the fault lies with defendants. Their cavalier and calloused attitude throughout the remedial phase of the suit almost seems to have been designed to antagonize plaintiffs. While they have diligently investigated the aquifer, they have utilized the results of that investigation to attack the Court's findings of liability and actual damages (issues no longer open) at least as much as they have used them to develop remedial cleanup plans. This misuse is relevant to their "good faith."

In developing cleanup plans, they initially concluded their fourteen month investigation with a report to the Court that the only feasible and logical cleanup plan was one that would take literally centuries; but when it became apparent that the Court was not receptive to this proposal, their estimates of plan time dropped like a thermometer before a winter storm. They ended up with a proposal only a third as long as their original one (from the 100 year chlorides-only Base plan to the 32 year plan), without a dramatic increase in present value cost. That they did not attempt to develop a plan of reasonable length initially also goes to good faith, especially considering the slight difference in cost. When defendants did develop modifications to their plan, they did so at the last hour, after having told plaintiffs that they were not changing their proposal to the Court. This appeared to be an abortive attempt to preclude plaintiffs from being prepared to critique the new plan as they had critiqued the Base plan.

In short, defendants conduct has *not* been one of attempting in good faith to develop the best possible proposal to clean up the aquifer: they have clearly tried to skate by with as little as possible, they have resisted and attempted to prevent plaintiffs' input to the proposals, and they have utterly failed to demonstrate the attitude of contriteness in remedying the wrongs they created—an essential ingredient in any review of punitive damages. Instead, they have yet to admit to this Court that they did anything wrong at all. At times, when they point a finger to the Carey salt plume upstream or defend their inaction in the brine fields by claiming that, since the fields were not leaking, the defendants cannot be blamed for not fixing them, defendants actually seem to be denying that they had anything to do with the salt getting into the acquifer in the first place!

Therefore, the Court concludes that defendants' lack of good faith in developing their proposal and working with

the plaintiffs during the remedial phase of this case precludes any possibility that they could be trusted to honestly pursue a cleanup attempt on the plaintiffs' land in the years to come. Moreover, the Court finds that this lack of good faith also mitigates against any argument that the original award of punitive damages was unjustified. The evidence at trial portrayed a "corporate callousness" on the part of American Salt that seemed to warrant the imposition of the ten million punitive damage award. Defendants conduct during the post trial proceedings have shown that this initial impression was correct.

A Court-ordered cleanup plan is therefore rejected because no feasible plan has been presented, and because defendants' conduct during the remedial course of these hearings has militated against the possibility that such a plan could be satisfactorily implemented. Either of these reasons are sufficient to reject a plan, but the Court finds a third reason as well. Initially, plaintiffs favored a cleanup attempt. At trial they indicated that if they could have their choice of remedy, they would choose clean water over money. *Miller*, 592 F.Supp. at 998. Although plaintiffs may still prefer this remedy in the abstract, they have begun to indicate to the Court their hesitancy about pursuing this remedy in the concrete. At the January, 1986, hearing, plaintiffs' counsel summed up plaintiffs' objection to the Base plan thusly: "This plan calls for my clients to be married to the defendants for two hundred years; but, your Honor, we aren't getting along *now*." Plaintiffs continual trouble with defendants has led to the change in plaintiffs' support of remedial action. More than once they have told the Court that, if things continued as they were, they would prefer to just take the money and forget about working out a remedial plan with the defendants. The Court cannot blame plaintiffs for their frustration. The Court has not seen anything to persuade it that things will

not continue as they have been. Defendants dismiss these problems. "Despite certain recent and disturbing statements by plaintiffs' counsel, we trust and fully expect that plaintiffs were then, and are now, men and women of their word and that the position they ultimately take will unequivocally confirm their initial representation to the Court." Dk. 661, p. 3. This Court finds that defendants' betrayal of faith removes any question of the trustworthiness of plaintiffs' word. And this Court would be reluctant to order implementation of any remedial plan without the support of the plaintiffs.

Defendants cannot claim that the Court has duped them by requiring the expenditure of all of these investigation costs, and then imposing the full amount of punitive damages. Despite attempts by defendants to imply otherwise, the Court made no promises or guarantees of punitive damage reduction at the beginning of the remedial phase. Had the Court not ordered this phase, KDHE would have required similar action and equivalent expenditures from them anyway. More particularly, had defendants properly investigated the aquifer prior to trial so that the recharge rate and the SAR phenomenon were known then (see New Trial section, *supra*), it would have been clear at trial that a cleanup could not occur within the parameters desired by the plaintiffs and the Court. In that instance, the Court would never have embarked upon this phase. Defendants can blame no one but themselves that these factors were not known and that this stage was not avoided.

Therefore, the Court finds that no feasible, Court-implementable plan has been presented and that defendants' conduct throughout the remedial phase of this case does not warrant a reduction in the punitive damage award initially made. Accordingly, defendants are ordered to pay the ten million punitive damage award, together with interest from August 13, 1984; the initial date of judgment.

VI. CONCLUSION

Following a lengthy trial, this Court found for plaintiffs and awarded them 3.06 million dollars in actual damages. The Court further found that defendants' conduct warranted a punitive damage award of ten million dollars. Because plaintiffs had indicated their preference for clean water over money, and because testimony had been presented that a cleanup might be technically feasible, the Court held the punitive damage award temporarily in abeyance, pending defendants' good faith efforts to define and remedy the pollution they had caused. The Court indicated that, if defendants made a conscientious, good faith and realistic effort to remedy the pollution *within a reasonable time*, that effort would be extremely relevant to the Court's assessment of the defendants' state of mind and to the appropriateness of the punitive damage award.

After an investigation and development period, defendants presented a cleanup plan lasting far longer than ever envisioned. Even at the end of the defendants' continual reductions in plan time, the Court finds that the pollution is still not remediable *within a reasonable time*. Moreover, the Court finds that defendants' conduct has been extremely relevant to the Court's assessment of the defendants' state of mind: it has demonstrated that the initial punitive damage award was appropriate.

Most relevant of all is that, throughout this time, the defendants have continued to pollute. This is relevant to cleanup time, for continual pollution clearly extends the time necessary for cleanup. It is relevant to defendants' state of mind, for while they have exerted incredible effort in attacking the Court's judgment and arguing for the cleanup plan most favorable to them, they have failed to exert the necessary effort to stop their continual pollution. The Court therefore declines to remit any of the punitive damage award, because it is

abundantly clear to the Court that we are no further along than we ever were: the "hog is still in the spring." *Miller*, 592 F. Supp. at 1008.

IT IS THEREFORE ORDERED that plaintiffs' motion to strike the reply memorandum in support of General Host's motion to dismiss is hereby denied.

IT IS FURTHER ORDERED that General Host's motion to dismiss is hereby denied.

IT IS FURTHER ORDERED that defendants' motion for a new trial on the ground of newly discovered evidence is hereby denied.

IT IS FURTHER ORDERED that defendants' motion to revise and amend the findings of fact and conclusions of law, or in the alternative, for a new trial, on the ground of newly discovered evidence, is hereby denied.

IT IS FURTHER ORDERED that defendants' motion to revise or amend the Court's opinion to dismiss the claims for lost crop profits for those plaintiffs who have no water permits is hereby denied.

IT IS FURTHER ORDERED that plaintiffs' motion for costs, expenses and fees is hereby granted as to fees for transcripts, witness fees, copying expenses, postage, long distance telephone expenses, and all fees billed by Dr. Raviv in connection with his work on defendants' development of a remedial action cleanup plan, including any lab fees related to that work; and is hereby denied as to attorneys' fees, attorneys' travel expenses, and all expert fees and lab fees not incurred pursuant to Dr. Raviv's work on defendants' development of their remedial plans. Plaintiffs are hereby ordered to submit within twenty days from the date of this order a revised statement of all post-trial costs for which the Court has authorized recovery. Defendants are to file their objections to plaintiffs' statement, if any, within ten days from the date of plaintiffs' filing.

IT IS FURTHER ORDERED that plaintiffs' motion to strike the affidavit of Elly Triegel is hereby granted.

IT IS FURTHER ORDERED that plaintiffs' motion to strike the status report of defendants' experts, filed on September 23, 1986, is hereby denied.

IT IS FURTHER ORDERED that defendants' motion to preclude consideration of non-evidentiary matters is, based upon the Court's interpretation of this motion as set out in this opinion, hereby granted.

IT IS FURTHER ORDERED that all proposed remedial action plans presented by defendants are hereby rejected, and defendants are hereby ordered to pay the actual and punitive damages initially assessed, together with statutory interest thereon from August 13, 1984; the initial date of judgment.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

No. 85-1450
(D.C. No. 77-1212)
(D. Kan.)

CECIL W. MILLER and MILDRED E. MILLER, Joint Tenants; MARGARET L. BIRCHENOUGH TESTAMENTARY TRUST, DONALD L. BIRCHENOUGH, ANSEL TOBIAS and WALTER WRIGHT, Trustees; RUTH M. HOLLINGER, Individually and as Joint Tenant with DELBERT HOLLINGER; JOHN E. EDWARDS and KERMIT C. EDWARDS, Joint Tenants; HOMER SHARPE; CECIL M. TOBIAS and FRANCES TOBIAS, Joint Tenants; PAUL WESTRUP and ARDIS B. WESTRUP, Joint Tenants; JAY BROTHERS; LYLE BROTHERS, Individually and as Joint Tenant with PARTICIA R. BROTHERS; ALVIN ENGELLAND; and ANSEL ENGELLAND; JACK ENGELLAND and VIVIAN M. ENGELLAND, Joint Tenants; GERALD N. JONES and DONNA JONES, Joint Tenants; ROBERT A. JOHANNSEN; RAYMOND E. TOBIAS; GARY ZWICK; LESTER COLLE; HARVEY WILLHAUS and MARILYN WILLHAUS, Joint Tenants; WILMOR H. ODEN; RAPHAEL ROEDER and ANNABELLE A. ROEDER, Joint Tenants; MRS. EDRIS EDWARDS; EDWARD F. JANDA and ANNA MAE JANDA, Joint Tenants; HARRY ZWICK; ARTHUR H. ODEN; JOLEEN J. OTTLINGER; and WILLIAM L. BEMIS and DOROTHY BEMIS, Joint Tenants,

Plaintiffs-Appellees,

v.

CUDAHY COMPANY, a Delaware Corporation, and GENERAL HOST CORPORATION, a New York Corporation,

Defendants-Appellants.

ORDER AND JUDGMENT
[Filed Jan. 31, 1986]

Before LOGAN, MOORE, and TACHA, Circuit Judges.

In accordance with 10th Cir. R. 9(e) and Fed. R. App. P. 34(a), this appeal came on for consideration on the briefs and record on appeal.

This matter comes on for consideration of defendants' motion to dismiss the appeal as premature. All further appellate proceedings have been suspended pending disposition of the defendants' motion to dismiss. Plaintiffs have responded to the motion and defendants have replied to the response. For the reasons that follow, we hold that the defendants' motion is well taken.

This is a tort case brought under federal court diversity jurisdiction. In general, forty land owners and lessees sought to recover damages caused by the defendants' operation of a salt mine near their property. The complaint stated causes of action for continuing nuisance and trespass. The district court's entire written opinion and order can be found at Miller v. Cudahy Co., 592 F. Supp. 976 (D. Kan. 1984). We refer the reader to that opinion for the details of the district court's judgment. Suffice it to say here that the district court entered a judgment against the defendants on the issue of liability on both claims asserted, and awarded actual and consequential damages on both claims. The district court, however, entered only a conditional judgment on the issue of punitive damages on the nuisance claim, reserving the final determination of the amount of punitive damages until after defendants' have studied and enacted a remedial program aimed at cleaning up the polluted acquifer.

In a development crucial to this appeal, the trial court, after the entry of its judgment described above, sua sponte certified that "the judgment of liability and the judgment for actual damages" was final under Fed. R. Civ. P. 54(b). *Id.* at 1008 and 1009. In light of these procedural facts, the key issue in this appeal is whether

the district court's Rule 54(b) certification was effective to confer jurisdiction on this court at this time of any portion of the judgment below.

It is clear that a Rule 54(b) certification cannot make a partial adjudication of one of several claims final if the judgment regarding that claim is not otherwise a final decision. Wheeler Machinery Co. v. Mountain States Mineral Enterprises, Inc., 696 F.2d 787 (10th Cir. 1983); National Corn Growers Association, Inc. v. Bergland, 611 F.2d 730 (8th Cir. 1980). The court then must determine whether the judgments entered on the claims asserted were otherwise final under 28 U.S.C. § 1291.

We hold that the district court's judgment on the nuisance claim is not a final judgment under § 1291. As in *Wheeler, supra*, by reserving its final judgment on the claim for punitive damages, the trial court in the instant case only entered judgment on the issues of liability and partial damages. *Wheeler* held that " 'where . . . judgment is rendered with respect to only part of the relief sought by the appellants, and where consideration of further relief is specifically reserved, judgment is neither final nor on an entire claim.' " *Wheeler, supra* at 789-90 (quoting Acha v. Beame, 570 F.2d 57, 62 (2d Cir. 1978)). *See also* International Controls Corp. v. Vasco, 535 F.2d 742, 744 (2d Cir. 1976); United States v. Burnett, 262 F.2d 55 (9th Cir. 1958). "To be final, a judgment must fully inform the losing party of the extent of the remedy afforded against it." Lamp v. Andrus, 657 F.2d 1167, 1168 (10th Cir. 1981).

Furthermore, the district court's entry in this case of what amounts to a "conditional judgment" as to punitive damages does not distinguish this case from *Wheeler*. The district court made it clear that it could and would modify the punitive damage award based on the defendants' good-faith efforts to define and remedy the salt pollution in the acquifer. Therefore, even though a pre-

liminary award of punitive damages has been made, the judgment does not actually "inform the losing party of the extent of the remedy against it." *Lamp, supra* at 116. The trial court's Rule 54(b) certification does not authorize an immediate appeal of the judgments of liability or partial damages on the nuisance claim.

By contrast, we hold that the judgment on the trespass claims is final under § 1291 since there was no punitive damages award on that claim and, therefore, the trial court has entered "a decision which ends the litigation leaving nothing to be done except execution of the judgment." *Lamp, supra* at 1168-1169. This being true, the issue becomes whether the district court's Rule 54(b) certification authorizes an immediate appeal of the trespass claims asserted below.

Of course, the district court's Rule 54(b) certification of the trespass claim could only authorize an immediate appeal of that claim if the trespass claim is a separate claim from the nuisance claim for purposes of Rule 54(b). We need not actually decide this issue however, because we hold that the district court's Rule 54(b) certification in this case does not authorize an immediate appeal of the trespass claim even if it is a separate claim under Rule 54(b). That is true for two reasons.

First, it is clear that the district court did not intend to divide its judgment for appeal along these lines. The district court only intended to reserve jurisdiction over the punitive damages award on the nuisance claim, and conversely intended to authorize an immediate appeal of all other aspects of the case. There should be no doubt as to the district court's intention to certify an appeal under Rule 54(b). United States v. Evans, 365 F.2d 95 (10th Cir. 1966). The district court's intention to certify just the trespass claim is not clear.

Second, a Rule 54(b) determination involves "weighing the overall policy against piecemeal appeals against

whatever exigencies the case-at-hand may present." Panichella v. Pennsylvania Railroad Co., 252 F.2d 452, 455 (3d Cir. 1958). In this case, any need to review the trespass claims at this time pales when contrasted to the need for unified review in this case.

In multiple claim cases, the treatment of pretrial matters and the presentation of evidence at trial is not neatly divided along the lines of the claims asserted. Therefore, independent review of the trespass claim and the nuisance claim would most likely require review of voluminous trial records which would be virtually identical. *Cf.* Para-Chem Co., Inc. v. Lowenstein Corp., 715 F.2d 128 (4th Cir. 1983) (the possibility of repetitive appellate review of same issues made certification improper). This case took five years to come to trial and the trial itself was six weeks long. Just as importantly, the defendants submitted their final, remedial plan for clean-up of the acquifer in December of 1985, and a decision on that plan is expected soon. At that time the $10,000,000 punitive damages award will be activated in some fashion and the entire judgment will be final. A unified review of the entire case would then be possible. In sum, the court would sacrifice substantial economy by allowing the piecemeal review of the presently adjudicated claims in this case.

Having ruled that the district court's judgment on the nuisance claim is not final and that the district court's Rule 54(b) certification does not cover the trespass claim, we conclude that the defendants' motion to dismiss this appeal as premature should be granted.

The appeal is DISMISSED

The mandate shall issue forthwith.

/s/ Howard K. Phillips
HOWARD K. PHILLIPS
Clerk

APPENDIX D

UNITED STATES DISTRICT COURT
D. KANSAS

Civ. A. No. 77-1212

CECIL W. MILLER and MILDRED E. MILLER, Joint Tenants; MARGARET L. BIRCHENOUGH, Testamentary Trust, DONALD L. BIRCHENOUGH and WALTER WRIGHT, Trustees; RUTH M. HOLLINGER, Individually and as Joint Tenant with DELBERT HOLLINGER; JOHN E. EDWARDS and KERMIT C. EDWARDS, Joint Tenants; HOMER SHARPE; CECIL M. TOBIAS and FRANCES TOBIAS, Joint Tenants; PAUL F. WESTRUP and ARDIS B. WESTRUP, Joint Tenants; JAY BROTHERS; LYLE BROTHERS, Individually and as Joint Tenant with PATRICIA R. BROTHERS; ALVIN ENGELLAND; ANSEL ENGELLAND; JACK ENGELLAND and VIVIAN M. ENGELLAND, Joint Tenants; GERALD N. JONES and DONNA JONES, Joint Tenants; RAYMOND E. TOBIAS; WILMOR H. ODEN; RAPHAEL ROEDER and ANNABELLE A. ROEDER, Joint Tenants; EDRIS EDWARDS; EDWARD F. JANDA and ANNA MAE JANDA, Joint Tenants; HARRY ZWICK; ARTHUR H. ODEN; WILLIAM L. BEMIS and DOROTHY BEMIS, Joint Tenants; ROGER EDWARDS; JOHN ENGELLAND; DON ENGELLAND; JIM HOLLINGER; CURTIS MILLER; ED TOBIAS; CURTIS TOBIAS; DON ZWICK; and ALVIN ZWICK,

Plaintiffs,

v.

CUDAHY COMPANY, a Delaware Corporation, and GENERAL HOST CORPORATION, a New York Corporation,

Defendants.

Aug. 13, 1984

Deborah Carney and Lee Turner, Turner & Boisseau, Chartered, Great Bend, Kan., for plaintiffs.

Thomas Kitch and Ron Campbell, Fleeson, Gooing, Coulson & Kitch, Wichita, Kan., for defendants.

OPINION AND ORDER

THEIS, Senior District Judge.

This is a pollution case in which over forty landowners and lessees seek to recover damages arising from salt pollution of the fresh-water aquifer beneath their lands. The case was called for a trial to the Court, sitting without a jury, on Monday, March 26, 1984. The parties presented their evidence over a span of thirty-three trial days, and all parties rested on Tuesday, May 15, 1984, at approximately seven o'clock in the evening. In the course of the trial, the Court heard live testimony from over fifty witnesses, with the plaintiffs calling approximately twenty-eight witnesses and the defendants approximately twenty-five. Some witnesses were repeatedly called to the stand. In addition, thousands of individual exhibits were introduced into evidence, including business records, demonstrative charts, maps, graphs, aerial photographs, models, rusty pipes, bottles of polluted water, and a salt block.

Following the trial, both sides submitted lengthy post-trial briefs containing suggested findings of fact and conclusions of law, with references to the voluminous record, and additional exhibits. The Court has carefully read these briefs, reviewed its trial notes, and individually assessed the credibility of the many witnesses. The Court is, after this preparation, ready to enter a judgment in this case pursuant to Rules 52(a), 54(b), and 58 of the Federal Rules of Civil Procedure.

Because the number of findings of fact is so great, the Court has subdivided those findings with several subject headings. These headings are provided solely as a con-

venience in understanding the organization of the findings and are otherwise without substantive significance.

I. FINDINGS OF FACT

A. Introduction to the Case

1. Parties

1. The plaintiffs in this case are owners and lessees of rural realty in Rice County, Kansas. The vast majority of this realty is used for agricultural production, while the remainder is used for rural homesites. The plaintiffs are in lawful possession of their properties.

2. All of the plaintiffs are citizens and residents of the state of Kansas.

3. The defendant Cudahy Company [Cudahy] is a Delaware corporation with its principal place of business in Phoenix, Arizona.

4. The defendant General Host Corporation [General Host] is a New York corporation with its principal place of business in Stamford, Connecticut.

5. At the time this lawsuit was filed, Cudahy was a wholly-owned subsidiary of General Host.

6. At the time this lawsuit was filed, one of the operating divisions of Cudahy was the American Salt Company [American Salt], with manufacturing plants at Lyons, Kansas and at the Great Salt Lake in Utah.

7. After the lawsuit was filed, General Host divested itself of Cudahy, but retained American Salt as a wholly-owned subsidiary. Subsequently, General Host signed a letter of intent to sell American Salt to a third party. That agreement remains executory at this time.

2. Preliminary Geography

8. The Kansas plant of American Salt is located approximately one-half mile southeast of Lyons, Kansas

and approximately four miles northwest of Saxman, Kansas. American Salt has carried on operations there since 1908.

9. Two miles south of Lyons is Cow Creek, a minor tributary of the Arkansas River, that meanders in a generally southeasterly direction.

10. Below Cow Creek is the Cow Creek Valley Aquifer [the aquifer], a fresh-water-bearing stratum. The aquifer can be found between the depths of roughly ten and seventy feet, and it occupies a width of between one and two miles.

11. Like the creek above, the aquifer below flows in a generally southeasterly direction, although at a much slower rate, between one and a half to five feet per day. In its natural state, free of the influence of pumping wells, the water in the aquifer requires about ten years to travel one mile.

12. The aquifer has well-defined borders on its sides, much like the banks of a surface creek. Cow Creek operates as a southern boundary, while a geologic formation that essentially parallels Cow Creek at a distance of one and a half to three miles serves as a northern boundary.

13. This lawsuit involves the land overlying the aquifer between the American Salt plant to the northwest and Saxman to the southeast. This land is owned or leased by the plaintiffs. The water in the aquifer passes under the American Salt plant before it passes under the plaintiffs' lands, and is heavily contaminated with salt.

3. Basics of Salt Mining

14. The natural salt formation exploited by American Salt lies approximately 725 feet below the ground surface in a stratum 280 feet thick. Interspersed within the salt stratum are layers of shale of various thicknesses.

15. Two methods are employed by American Salt to get this salt to the surface. The first method utilizes a shaft mine and involves sending workers down into the salt stratum to physically remove solid salt and transport it to the surface.

16. The second method utilizes a matrix of brine wells and involves injecting high-pressure fresh water into the salt stratum, allowing the water to dissolve the salt, recovering the resulting brine, and evaporating it to produce solid salt. This method is called solution mining.

17. Until 1979, American Salt drilled its wells as individual brine wells. An individual brine well is so constructed that fresh water may be injected into and brine withdrawn from the salt stratum through the same well.

18. Three steps are involved in drilling and casing an individual brine well. First, a relatively shallow surface hole is drilled and an 8⅝ inch surface casing set into that hole. Second, a production hole is drilled to the bottom of the salt stratum, and a 5½ inch production casing set into that hole so that the casing ends near the top of the salt stratum. Third, a 2⅜ inch production tubing is suspended inside the production casing so that the tubing ends near the bottom of the salt stratum. This creates two pathways into the salt stratum: one inside the tubing and the second between the tubing and the production casing. The space between the tubing and the production casing is called the annulus.

19. In the so-called "normal mode" of solution mining, fresh water is injected through the tubing to the bottom of the salt stratum. This high-pressure water dissolves the salt and forces the resulting brine, which is heavier than fresh water, to flow upward through the annulus to the surface. Such operation washes a compact spherical cavity deep in the salt stratum, and produces a modest brine flow of ten to fifteen gallons per minute [gpm] from a mature well.

20. In the so-called "reverse mode" of solution mining, fresh water is injected through the annulus and brine is withdrawn from the tubing. Such operation washes a very large, shallow, trumpet-shaped cavity on the top of the salt stratum, but produces a substantially greater brine flow of forty to forty-five gpm from a mature well.

21. American Salt's individual brine wells are situated approximately 400 feet apart. Long-continued operation of these wells in the normal mode, or substantially shorter operation in the reverse mode, can cause the cavities in the salt stratum to wash together. When this occurs, the wells are said to be interconnected. Four large areas of interconnection, involving almost all of American Salt's individual wells, have developed in both the original brinefield [the old brinefield] and the 1959 individual-well addition [the new brinefield].

22. In 1979, American Salt switched to the gallery method of solution mining. To create a gallery, three wells are drilled and surface and production casing is installed, but no production tubing is installed. Brine is then injected into the center well under pressure great enough to lift the 800 feet of overburden and to create a fracture in the salt stratum. This procedure is called a hydrofrac. If the hydrofrac is successful, the fracture will pass through the bore holes of the two outside wells and permit a channel to be washed between them. Brine is used to create the fractures because it will not rapidly wash a channel if the fracture goes astray, as they are wont to do. Once a connection between the target wells is established, fresh water is injected through the well at one end of the gallery and brine is withdrawn from the well at the other end of the gallery. This method produces large quantities of brine and avoids the numerous maintenance problems associated with production tubing, as no production tubing is ever installed in any of the gallery wells.

23. Regardless of the method by which the brine is produced, it is collected at the wellhead and transported

to the main plant via buried pipelines. The brine is then processed into solid salt. The design of the processing equipment is such that saturated brine—that is, water holding the greatest possible amount of salt in solution—is necessary for efficient operation. Saturated brine contains two and a half pounds of salt per gallon, or about 250,000 parts per million.

24. The brine was originally processed into solid salt in devices called granier pans. The granier pans were large flat open-topped tanks with steam coils in the bottom. Brine was dumped into them and boiled until the increasing concentration caused salt to crystalize and fall out of solution. The salt crystals were then scraped up by paddlewheels and transported by conveyor belt to a drying room, where the crystals were dumped on a slatted floor and excess brine was permitted to drip through, directly onto the ground. American Salt's granier pan operation continued until 1962, when demand for granier pan salt ceased.

25. In 1928, American Salt installed its first set of vacuum pans. Vacuum pans are very large upright closed tanks in which brine is boiled and continuously circulated. The resulting steam is withdrawn and condensed, creating a partial vacuum inside the pans. Steam withdrawal and brine input are carefully balanced, and crystalizing solid salt is removed from the bottom of the pans. Vacuum pan salt is dried by machines with heat.

26. Circulation in the vacuum pans is critical. If circulation of the salt slurry inside the pans is lost for any reason, the crystalized salt inside the pans settles to the bottom and sets up like cement, completely plugging the system. Disassembly and manual cleaning of the pans, a lengthy and expensive process, is then required before production can be re-established.

27. A second set of vacuum pans was installed in 1970-71. The 1928 pans were taken out of service in 1979, when a third set of pans was installed.

28. Effluent is produced by American Salt's operations. In the early days this effluent was simply dumped into the creeks. Attempts to reuse the effluent in the solution mining process were hampered by the large amount of solid matter and sulfates contained in it. By 1936, a settling pond was in use to remove the solids from the effluent. Part of the effluent was then recycled.

29. In 1968, a deep disposal well was constructed for the plant effluent. The disposal well conducts the effluent into a porous formation called the Arbuckle, found at a depth of approximately 4000 feet. Because the Arbuckle can be plugged up by solids, it is necessary to remove the solids from the plant effluent before it is placed into the disposal well. American Salt removes the solids from its effluent by running the effluent through settling cavities. The settling cavities are nothing more than the inactive large caverns created when the individual brine wells interconnected. When American Salt was conducting active solution mining in the new brinefield, the interconnected caverns in the old brinefield were used as the settling cavity. When American Salt switched to the gallery method of production, the interconnected caverns in the new brinefield were used as the settling cavity.

30. Settling cavity operation involves injecting the collected effluent into an old brine well at one end of an interconnected cavern and withdrawing the effluent from a second old brinewell at some distance from the injection well. The time required for the effluent to move through the cavern allows the solids contained in the effluent to settle out by gravity. There are two significant consequences. First, the size of the interconnected cavern continues to increase, because the effluent is not saturated brine and therefore dissolves solid salt from the salt stratum as it passes through the cavern. Second, the interconnected cavern, and every single well that penetrates that cavern, are subjected to the plant pressure used to inject the effluent into the interconnected cavern. The

interconnected caverns are of immense size and contain approximately half a billion gallons of brine and effluent.

4. History of the Litigation

31. The original complaint in this case was filed on May 31, 1977. That document alleged that the plaintiffs had been permanently damaged and sought recovery at the rate of $450 per acre, representing the difference in value between dry land and land with good water under it, along with punitive damages and equitable relief.

32. After an arduous discovery phase, the pre-trial order was filed on March 9, 1982. That document, by its own terms, superceded the pleadings in the case. The plaintiffs contended that the defendants' activities "constitute a continuing nuisance, trespass, and damages," Dk. No. 309, at 4.

33. After the pre-trial order was filed and after the vast majority of the discovery in the case was completed, the defendants moved for partial summary judgment in an extremely lengthy motion filed on November 2, 1982. Although several specific grounds for partial summary judgment were urged in relation to several specific parcels of land, the main thrust of the motion was the defendants' assertion that that plaintiffs were totally barred from any recovery by the two-year statute of limitations found at K.S.A. § 60-513.

34. After heavy briefing from all parties, this Court entered a lengthy Order and Opinion on June 21, 1983, *see Miller v. Cudahy Co.*, 567 F.Supp. 892 (D.Kan.1983). This Court squarely rejected the statute of limitations argument, holding that the apparently continuing nature of the pollution emanating from the American Salt facility was sufficient to categorize the plant as a continuing nuisance causing temporary damages and "giving rise over and over again to causes of action to recover for

the injuries sustained in the statutory period immediately preceding the filing of the suit, at least so long as some acts of pollution continue," *Miller*, 567 F.Supp. at 906.

35. The case was called for a bench trial on March 26, 1984, and submitted to the Court for decision on May 15, 1984.

B. Responsibility for Pollution

36. There is no credible evidence that indicates that any of the sale presently polluting the aquifer came from any source other than American Salt. The testimony offered by the defendants suggesting that salt pollution was contributed by oil and gas operations or by other salt mining companies in the 1940s is expressly found to be incredible.

37. All of the salt presently dissolved in the aquifer escaped from the property and control of American Salt. The existence and extent of the salt pollution has been shown by the chloride readings taken from a limited system of monitor wells installed by the state of Kansas in the summer of 1968 [the state monitor wells], *see* plaintiffs' exhibit 25, and from a series of test holes drilled and sampled by Darrell Clarke in 1978, *see* plaintiffs' exhibit 120, 121.

38. The salt presently dissolved in the aquifer reached the groundwater by two separate paths. A minority of the salt reached the aquifer by being spilled on the surface and percolating downwards. The majority of the salt reached the aquifer by direct subsurface leaks from the solution mining and settling activities.

1. Surface Pollution

39. Salt reaching the groundwater through surface spills and percolation took two forms. Some of it was

spilled or dumped on the surface as solid salt. The remainder was spilled on the surface as liquid brine.

40. Solid salt was intentionally dumped on the surface at two locations: reject rock salt was dumped north of the shaft mine mill area at the north end of the plant site, and broken salt blocks and spilled salt from broken bags and packages was dumped in the south dump at the south end of the plant site. Salt dumped on the suface was dissolved by rain and eventually percolated directly into the groundwater. The rock salt in the north dump was leveled and covered with clay in 1958, but was subsequently dissolved by floodwaters in 1962. Tons of salt were percolated into the groundwater from the south dump until 1979, when the remaining 1462 cubic yards of salt were excavated and properly incapsulated under clay and asphalt at the old north dump site.

41. Liquid brine has been dumped and spilled on the surface of the American Salt facility since the inception of operations there in 1908. Surface brine spills originated primarily from four sources: (1) operation of the granier pan system; (2) operation of the vacuum pan system; (3) surface storage of brine and effluent; and (4) leaks from surface lines and wellheads.

(a) Granier Pan Operation

42. Operation of the granier pan system was extremely messy and contributed countless tons of salt to the plant's surface pollution in the nearly fifty-five years the system was in operation. Absolutely no consideration was given to the pollution characteristics of this system in either its design or operation. Brine escaped from every subpart of the granier pan system, and great quantities of brine were knowingly and intentionally permitted to drain onto the ground during the drying process. The quantities of brine permitted to escape were so great that large ponds of brine often formed at the south-

east corner of the plant site, in accordance with the natural drainage properties of the area.

43. In addition, surface pollution was caused when the granier pans were washed out. In the course of normal operations, sludge would form on the steam coils in the bottom of the granier pans. This sludge was removed by dumping the brine in the pans onto the ground, flushing the pans with fresh water, and dumping the wash water onto the ground. This washout operation was done at intervals ranging from five to six weeks, and was done without consideration of the pollution consequences.

(b) Vacuum Pan Operation

44. The vacuum pan system was a major improvement over the granier pan system from a pollution standpoint. Because the vacuum pan system is enclosed and uses machines and heat to dry the solid salt, the considerable pollution caused by escaping brine in the conveyor belt and drip-drying stages of the granier pan system was completely eliminated. This is not to say, however, that the vacuum pan system did not contribute substantially to American Salt's surface pollution.

45. Like the granier pans, the vacuum pans accumulated sludge and debris during normal operation and required routine washouts. Initially the vacuum pans were washed out on a daily basis. The washout period has been extended, by gradual steps, to about two weeks. Considerable pollution was caused in the past by the escape of these wash waters.

46. The major source of vacuum pan surface pollution resulted from what the defendants liked to call "upsets." The pans experienced an upset whenever circulation of the salt slurry inside them was lost. Circulation was lost whenever either the water or electrical supply to the plant was interrupted. Such interruptions were perfectly forseeable and occurred up to eight times per year.

47. When circulation was lost, the crystalized salt inside the pans would settle unless the contents of the pans were dumped. Allowing the salt to settle would plug the system, and unplugging the system required forty-eight hours of emergency work and cost up to $60,000. In addition, the plant was shut down and production was lost when the pans were plugged. It was, therefore, routine practice to dump the pans during upsets.

48. Dumping the pans prior to September of 1977 was an ecological disaster. The pans are very large devices, standing about sixty feet tall and each containing 16,000 gallons of super-saturated brine. During normal operation, input and outtake are balanced so as to maintain twenty tons or solid salt in circulation in each pan. Because the pans are sequentially connected to the steam supply and are served by the same electrical and water systems, upsets usually require dumping all four pans at once. A single upset therefore results in the dumping of almost eighty tons of solid salt and tens of thousands of gallons of super-saturated brine.

49. Prior to September of 1977, the only thing that stood between the environment and the massive quantity of salt dumped during upsets was the eight-inch concrete curb around the perimeter of the floor of the vacuum pan building. This curb originally did not extend across the doorways of the building, and therefore did not form a continuous eight-inch barrier. Although the curb was usually sufficient to restrain the two to three tons of salt intentionally purged from the vacuum pans each day to remove unwanted salt lumps, it was utterly and completely inadequate to handle the torrents created during upsets. The vast majority of the material dumped during upsets would simply flood out of the vacuum pan building and run across the ground, escaping from American Salt's control and into the environment. The pans were dumped during upsets with full knowledge of, and without regard to, the pollution consequences.

50. American Salt finally addressed the upset problem with the construction of an emergency catch basin, which became operational in September of 1977. Far from a highly technological device, the emergency catch basin is basically an empty pond. A swinging gate was installed in the normal discharge path from the plant. The gate is controlled by a sensor in the effluent flow, and the gate swings from one position to another when the salt content of the effluent reaches a predetermined level. Effluent of low salinity escapes from the plant in the normal path, while effluent of high salinity, such as that produced during upset dumps, is directed by the gate into the emergency catch basin, where it is simply held. Once the upset has passed, the contents of the emergency catch basin are pumped back into the plant and reused. Such a system could have been constructed decades earlier.

51. Upset dumps of the vacuum pans prior to the installation of the emergency catch basin occurred most recently in the summer of 1976 and in the early part of 1977.

(c) Surface Storage

52. Surface pollution was also caused by American Salt's practice of storing and holding liquid brine and effluent in unlined surface ponds, from which the brine and effluent could percolate into the groundwater.

53. The first such source was constructed in the mid-1930s and is called the settling pond. Located in the northern part of the old brinefield, the settling pond was used as recently as 1968. Plant effluent was simply dumped into this pond, and whatever fluids failed to evaporate or to percolate downwards through the bottom of the pond and into the groundwater ran out of the pond and escaped from American Salt's control. During the years it was in use, the settling pond filled with carbonates and sludge. The pond is easily visible as a white shape on the aerial photographs introduced into evidence, *see* defendants' exhibit X-15.

54. The second such source was constructed in late 1972 and is called the recycle pond. Located in the new brinefield, the recycle pond is still in use today as a surge tank, of sorts, for the solution mining system. When built, the recycle pond was unlined, and permitted the high-salinity fluid stored in it to percolate into the substrata. In February of 1974, a hypalon liner was installed in the recycle pond to isolate the fluids stored in it from direct contact with the ground. The intent of the liner was defeated, however, by intentionally storing so much fluid in the pond that the surface level of the fluid was higher than the top of the liner. The recycle pond was operated above the liner almost continuously until 1978, without regard to the pollution consequences.

(d) Line and Wellhead Leaks

55. Because the solution mining system operates under considerable pressure, integrity of the above-ground brine lines and the brine connections on the wellheads is critical in preventing surface spills of saturated brine. Instead of maintaining an aggressive program of preventative maintenance to insure that integrity, however, American Salt operated its plant and equipment to failure. Lines and wellheads were repaired after they started leaking, instead of being maintained to prevent their leaking. In the process, saturated brine regularly escaped onto the surface of the ground, where it could percolate into the substrata. Some seventy spills releasing over 652 tons of salt onto the surface were documented between 1976 and the time of the trial. Spills from the wellheads, caused by leaks and careless maintenance practices, were so constant that salt scars formed on the surface around each well. These scars are readily visible on aerial photographs of the brinefields, *see* defendants' exhibit X-15.

56. These events occurred with sufficient regularity, and were of sufficient duration, that the plaintiffs were able to preserve evidence of them photographically. Burst hoses on the wellheads were particularly spectacular,

sending plumes of saturated brine dozens of feet into the air. Once such brine penetrated the surface of the ground, it had escaped from American Salt's control.

2. Subsurface Pollution

57. The aquifer underlying the land at issue in this lawsuit is carrying a burden of somewhere between 150,000 and 325,000 metric tons of dissolved salt. Egregious as American Salt's surface pollution has been, that surface pollution alone could not have contributed so massive a quantity of salt to the groundwater. Because the evidence clearly showed that all of the salt presently dissolved in the aquifer escaped from the property and control of American Salt, and because the surface pollution alone was insufficient to produce the pollution load carried by the aquifer, this Court has carefully scrutinized the evidence relating to the subsurface aspects of American Salt's operation.

58. Subsurface pollution of the aquifer occurred primarily through two activities: active solution mining and settling cavity operation. In either case, a lack of casing integrity in one or more brine wells provided the mechanism whereby saturated brine could be injected underpressure directly into the aquifer.

(a) Proper Brinewell Construction

59. Current solution mining practices requires that, to prevent all possibility of pollution to underground water-bearing strata, a surface casing be set to a depth of about 200 feet and cemented back to the surface. Cementing a surface casing back to the surface involves forcing cement placed inside the surface casing to flow upwards into the space between the outside of the surface casing and the outside of the bore hole. The surface casing protects the aquifer by interposing the steel casing itself and a layer of cement between the aquifer and the working bore of the well. As additional protection, the

production casing, which extends from the surface to the top of the salt stratum, is likewise cemented all the way back to the surface. This adds a second steel casing and a second layer of cement between the aquifer and the working bore of the well, and has the critical function of totally enclosing the surface casing in cement. The surface casing is thereby completely isolated from both the fresh water of the aquifer and the brine from the solution mining process. Rusting of the surface casing, if it occurs at all, occurs very slowly.

60. To emphasize this important point, the following description is offered of a properly completed casing system in a brine well, as viewed from the top. First, there is the edge between the earth and the bore hole. Second, there is a layer of cement. Third, there is the steel surface casing. Fourth, there is another layer of cement. Last, there is the steel production casing. The elements of the casing system form four concentric circles of alternating cement and steel. *See* defendants' exhibit ZZ.

61. When the time comes to plug such a well, the first step is to set a device known as a bridge near the bottom of the production casing. The bridge acts like a cork and completely stops up the production casing. Special tubing is then inserted inside the production casing all the way to the bridge. Cement is then injected at the bottom, through the special tubing, until cement appears at the surface. The tubing is then withdrawn, and additional cement added as necessary, until the tubing is out of the well and the production casing is completely filled with cement. No leakage can occur from a well plugged in this manner.

62. These techniques, and their superiority over other methods, have probably been known since the 1920s, and have certainly been known since the 1940s.

(b) Early American Salt Brinewell Construction

63. American Salt first cemented surface casing back to the surface in well 25, completed in August of 1943. Production casing was first cemented back to the surface in well 32, completed in September of 1951. Prior to these wells, American Salt used methods of well construction that are inferior by modern standards.

64. In wells 1 through 25, a drive pipe was substituted for cemented surface casing. A drive pipe, as the name implies, is simply driven into the bore hole. Theoretically, the drive pipe should be driven slightly into the impermeable rock layer beneath the aquifer to make a seal of sorts. American Salt installed between sixty and 101 feet of drive pipe in these wells. Drive pipes in the sixty to 100 foot range were used intermittently with cemented production casing as late as 1964, in well 45.

65. Some of the wells with drive pipes—e.g., well 5—did not have production casing to the top of the salt. Well 5 had less than 300 feet of casing. From 300 feet to the top of the salt stratum, the well was an unlined and open hole.

66. No records were kept concerning the drilling or casing of wells 1-4.

(c) Subsurface Pollution from Solution Mining

67. If integrity was lost in the production casing and the surface casing or drive pipe of an active brine well, the pressure under which the solution mining took place was sufficient to force saturated brine out of the casing system and into the groundwater. Objective evidence of such pollution was nearly impossible to obtain, however, because the pollution took place underground with no surface manifestations. Had American Salt metered the fluids going into and coming out of its brinewells, such losses might have been detected. American Salt did not meter its fluids.

68. Despite these difficulties, objective evidence of one instance of subsurface pollution from a brinewell was introduced. In October of 1977, a continuous rushing noise was heard emanating from well 34, which had been inactive for about two years but had not been plugged. The pressure of the solution mining process going on in the new brinefield was alternately raised and lowered, and well 34 showed corresponding pressure changes. This proved that well 34 was interconnected with the active brinefield. Further tests were then run that indicated the presence of an opening between the aquifer and the well at a depth of approximately 70 feet. Well 34 was thus acting as a conduit between the active brinefield and the lowest level of the aquifer. Calculations revealed that the opening was permitting 250 gallons of brine per minute to escape into the groundwater, and the well was not plugged for nearly two weeks after the leak was discovered. At a minimum, 6750 tons of salt entered the groundwater during this occurrence. There is no way to determine how long the well leaked before it started making enough noise to call attention to itself.

(d) Subsurface Pollution from Settling Cavity Operation

69. If integrity was lost in any well that penetrated an interconnected cavern being used for a settling cavity, the pressure used to inject and recover the plant effluent from the settling cavity was sufficient to force the effluent out of the casing system and into the groundwater. Once again, objective evidence of such pollution was nearly impossible to obtain because of the hidden nature of the pollution.

70. American Salt has used three separate settling cavities. The first was located in the northern part of the old brinefield (wells 12, 12a, 18, and 20) and was used intermittently between 1958 and 1973. The second was located in the southern part of the old brinefield (wells

35 and 36) and was used between 1973 and 1981. The current settling cavity is located in the new brinefield (wells 59 and 66) and has been used since 1981.

71. The first settling cavity was a major source of subsurface pollution. The interconnected cavern utilized as the first settling cavity formerly comprised at least sixteen individual brinewells, which had completely interconnected. Included in the interconnected cavern were the oldest brinewells constructed by American Salt, none of which had cemented surface casing. The oldest wells penetrating the cavern dated from 1908, while the newest wells dated from 1933. Several of the wells were reworked in 1957, prior to the initial use of the settling cavity. When first put into use, the cavity had integrity.

72. Within four years of the activation of the first settling cavity, salt appeared in the well water and in the sand pits of a commercial redi-mix concrete plant located immediately adjacent to the old brinefield on the west.

73. Reference to leaks in this settling cavity first appear in the plant records in 1971, *see* plaintiffs' exhibit 218.5. In early 1973, a major leak in the casing of one of the interconnected wells forced American Salt to abandon this settling cavity permanently.

74. Investigations of the condition of the wells comprising the first settling cavity, conducted after the cavity was removed from service, revealed that many of the wells were in very poor condition. For example, well 3, during the entire period of operation of the first settling cavity, was only plugged to the extent of having a piece of wood hammered seven feet into the casing. Well 14, which supposedly had 666½ feet of casing installed in it in 1930, was found to be an unlined and open hole, completely without casing, below eighty-two feet. While the defendants cannot be blamed for failing to use 1970s methods when drilling, casing, and plugging these old

wells in the 1910s-1950s, the continued use of these wells as part of the settling cavity, without any attempt to modernize them in accordance with the latest plugging technology, is blameworthy.

75. Operation of the first settling cavity contributed very significant amounts of pollution to the aquifer. It is impossible to ascertain with any precision the quantity of salt actually lost into the groundwater from this source.

76. The second settling cavity was also a major source of subsurface pollution. In May of 1979, an effluent leak of twenty to thirty gallons per minute was noted at an open nipple on the drive pipe of well 35, which was one of the wells in the settling cavity. The flow was stopped by driving a wooden plug in the nipple, so that the leak would not be apparent at the surface. Additionally, a hole was discovered in the casing of the well at a depth of approximately six feet. This hole was subsequently patched, but the well itself was not plugged until 1982.

77. Operation of the second settling cavity contributed significant amounts of pollution to the aquifer. It is impossible to ascertain with any precision the quantity of salt actually lost into the groundwater from this source.

78. There is no credible evidence that the current settling cavity has contributed significant amounts of pollution to the aquifer since 1981.

(e) Additional Subsurface Pollution

79. A final source of subsurface pollution is the buried brine and recycle lines used to transport water from the plant to the brinefield and brine from the brinefield to the plant. Several of these lines are constructed from transite pipe, a non-metallic and fairly brittle asbestos and epoxy product. Transite pipe must be bedded in sand for satisfactory performance, but American Salt dis-

regarded the manufacturer's recommendations and failed to use sand bedding on several transite pipelines. As a consequence, these lines crack and separate during the changes of the seasons, and permit their contents to escape into the surrounding soil.

80. The leakage of these underground lines is a continual problem. A major pipeline break even occured during the trial, releasing significant amounts of high-chloride water that flowed into an unlined ditch where it was free to percolate into the substrata. Although American Salt took prompt remedial action by attempting to suck up the salty water and then dilute the remainder, such after-the-spill efforts cannot possibly recapture all of the escaped salt. Such after-the-spill efforts are, however, substantially less costly than digging up the lines and properly bedding them in sand to prevent leaks in the future.

3. Continuing Nature of the Pollution

81. The defendants insist that the salt plant has caused no significant pollution since 1975, and probably none since 1965. The evidence adduced at the trial, however, along with the rational inferences from that evidence, showed that it was more probable than not that the salt plant contributed genuinely and unequivocally significant amounts of new pollution to the aquifer on a continuing basis at least until the second settling cavity was taken out of service in 1981. The evidence and the rational inferences from that evidence further showed that, although very major improvements in the pollution characteristics of the plant have been made since this suit was filed in 1977, the plant nevertheless continues to add legally significant amounts of pollution to the environment on a regular and recurring basis up to the present time.

82. In addition, there is no dispute that the pollution itself, as opposed to the events by which the pollution is

introduced into the environment, is of a continuing nature. Nowhere within the plant's sphere of influence can the groundwater be used for irrigation purposes—including the areas immediately adjacent to the plant, where one would expect the influx of unpolluted water from up-gradient to have displaced the salty water if all active pollution had actually been halted ten to twenty years ago.

C. Damages

1. Loss of Crop Profits

83. Salt concentrations of over 30,000 parts per million have been recorded in water drawn from the aquifer. Concentrations of only 250 parts per million are sufficient to make water taste salty and to render it unfit for domestic and irrigation use.

84. Natural rainfall in Rice County is insufficient for corn to be grown there. Thus, only dryland crops, such as wheat and milo, may be grown on non-irrigated Rice County land.

85. The land involved in this lawsuit could be irrigated but for the salt pollution of the aquifer. The climate, soil quality, terrain, and aquifer characteristics make this land ideal for growing irrigated corn, but for the pollution of the aquifer. The plaintiffs would have earned a better return in the past, and would earn a better return in the future by growing irrigated corn on this land. The growing of irrigated corn has been the highest and most profitable use of this land under the state of the irrigation art during the pendency of this case. The plaintiffs cannot grow corn on this land solely because of the salt pollution of the aquifer.

86. Because the salt in the aquifer escaped from the control of the defendants, and because the salt in the aquifer is the only reason why irrigated corn cannot be grown on the plaintiffs' lands, there is a direct causal

connection between the defendants' polluting acts and the plaintiffs' inability to grow irrigated corn.

87. Because irrigated corn would be more profitable for the plaintiffs than the dryland crops they are forced to grow because of the salt pollution of the aquifer, the plaintiffs have been damaged by the pollution to the extent of these lost crop profits.

88. The plaintiffs have done nothing to increase or exacerbate their damages. The plaintiffs have, however, taken reasonable steps within the bounds of common sense to minimize their damages. Rather than allowing their lands to lie fallow, the plaintiffs have placed their property into dryland agricultural production, growing unirrigated wheat and milo crops of considerable value each year. While other activities by the plaintiffs to minimize damages are conceivable on the facts of this case—such as selling the land involved in this lawsuit and buying whatever other irrigable farmland they might be able to find for sale, or constructing a pipeline to bring in fresh water—none of those activities could have been undertaken with a reasonable effort and without undue risk, expense, or humiliation. The plaintiffs took all the reasonable steps that were available to them to minimize their damages.

89. Computation of the plaintiffs' damages caused by their loss of crop profits rests on the intricate interrelationship of many factors, including the value of the wheat and milo crops actually grown; the sale value of the corn crops that would have been grown; the yields to be expected from the corn crops; the number of acres that would have been devoted to irrigated corn crops; the expenses of buying, setting up, and operating the irrigation system; the inherent expenses of raising corn as opposed to wheat or milo; and the proficiency of the individual farmers. Expert testimony was offered by both sides on these factors, and the plaintiffs themselves

testified on those factors especially within their own knowledge.

90. Because of the number of potential variables, the estimates of the damage covered a very wide range. The width of the range is attributable to the diversity of the sources relied on by the various witnesses to provide concrete numbers to plug into the damage formula. The formula itself remained fairly constant, namely to subtract from the *net* value of the lost corn production the *net* value of the wheat and milo crops actually grown.

91. The plaintiffs' expert witness on this subject, Tom Dechant, calculated the damages by six different methods using three basic variables: yields per acre, prices per bushel, and production costs per acre. Dechant's analysis concluded that the accumulated damages of all of the plaintiffs for the entire nine-year period from 1975 to 1983 ranged from a low of $1,504,869 to a high of $11,500,620. The low figure relied on several independent sources for numbers for the three variables, while the high figure used the expected yield figures stated by another of the plaintiffs' expert witnesses.

92. Plaintiff Cecil Miller also opined on the subject of damages by supplying his own numbers for the variables. Miller's analysis concluded that the accumulated damages of all of the plaintiffs for the nine-year period ranged from $7,349,819.40 to $11,108,997.90.

93. The defendants' expert witness on this subject, Donald Pretzer, performed an analysis identical to two of Dechant's methods but utilizing different numbers for the production costs per acre. Pretzer was involved in the publication of the production-costs-per-acre figures used by Dechant, and Pretzer felt Dechant had misapplied some of the figures. As computed by Pretzer with his corrected figures, the accumulated damages for all of plaintiffs for the nine-year period ranged from $943,773 to $1,019,524.

94. Pretzer also performed a completely different type of damage analysis in which he calculated diminution in the rental value of the plaintiffs' lands caused by the destruction of the irrigation potential of those lands. This analysis produced an accumulated damage figure of $715,260.70.

95. The determination of the actual amount of lost profits suffered by the plaintiffs is heavily dependent on the Court's assessment of the credibility of the various witnesses who testified on this subject and the credibility of the sources consulted by those witnesses. The amount by which the bias and interests of the witnesses could affect the calculation is well-demonstrated by the ten-million-dollar difference between Miller's highest figure and Pretzer's lowest figure.

96. After carefully considering the credibility of the witnesses and the many documents introduced into evidence to support their conclusions, this Court finds that Miller's supporting numbers are overly optimistic and that his damage figures are, therefore, significantly overstated. The Court also finds that Pretzer's supporting numbers are overly pessimistic and that his damage figures are, therefore, significantly understated. The Court further finds that Dechant's testimony concerning the first two of his six methods of calculating the damages to be the most credible offered to the Court on the subject, and to be the most credibly supported by detached and unbiased data, with one minor exception. Dechant proceeded on the assumption that 3,108 acres would be placed in irrigated corn were it possible to grow irrigated corn on the plaintiffs' lands. The Court finds this figure to be unsupported by the evidence, and further finds that a maximum of 2,800 acres would be placed in irrigated corn were it possible to grow irrigated corn on the plaintiffs' lands. Correcting Dechant's figures to reflect losses on only 2,800 acres, his first method reveals an accumu-

lated loss of approximately $3,125,000; while his second method reveals a loss of approximately $2,995.000.

97. The Court therefore finds that the plaintiffs have lost crop profits in an aggregate amount of $3,060,000 during the years 1975 through 1983, inclusive, as a direct and proximate result of the pollution escaping from the defendants' salt plant.

2. Consequential Damages

98. Several of the plaintiffs have alleged that they have been damaged by having to replace their plumbing and various water-using appliances such as dishwashers, washing machines, hot water heaters, and septic tanks. The plaintiffs failed, however, to introduce credible evidence that would allow this Court to determine the existence of a causal connection between the defendants' pollution and the necessity of these repairs, particularly with regard to apportioning the demise of these appliances to either the expiration of their normal service lives or to accelerted decay brought on by the salty condition of the water. The plaintiffs also failed to introduce credible testimony that would allow the Court to determine with certainty when some of these expenses were incurred. The plaintiffs affirmatively allege that some of the repairs were performed as long as thirteen years ago. For these reasons, the Court is unable to discern, with reasonable certainty, the amount of consequential damages suffered by these plaintiffs in the form of damage to plumbing and appliances.

99. In contrast, credible evidence was introduced to demonstrate a causal connection between the salt pollution and physical damage to the domestic water wells of plaintiffs Ed Tobias and Lyle Brothers. Tobias was forced to drill a new domestic well at a cost of $5000, while Brothers was formed to redrill two wells at a cost of $1000 each.

100. Brothers likewise introduced testimonial evidence showing damage to his dairy operation. Brothers owns fifty to sixty dairy cows, and those cows produce less milk and require more feed because of the high salt content of the dairy barn water supply, which is derived from the polluted aquifer. After assessing the credibility of this testimony and examining the figures provided by Brothers, the Court finds that his dairy operation has been damaged in an aggregate amount of $42,500 during the years 1975 to 1983, inclusive, as a direct and proximate result of the pollution escaping from the defendants' salt plant.

3. Surface Damage

101. Brine occasionally escaped from the defendants' control and physically washed over some of the plaintiffs' land. Such invasions left a salt residue in the soil that prevented normal agricultural production. Plaintiff Delbert Hollinger testified that eight acres owned by him had been damaged in this way, while plaintiff Cecil Miller testified that twenty-five acres of his land and six acres owned by the Birchenough Trust and farmed by Miller had been damaged in this way. The testimony was conflicting on how many acres were affected and the severity of the damage to the acres that were affected.

102. After assessing the credibility of the witnesses and examining the figures provided by the parties, the Court finds that eight acres farmed by Hollinger and thirteen acres farmed by Miller has suffered surface salt damage that manifests itself by a total loss of production for the dryland crops planted on those acres.

103. The Court further finds that the damage wrought by this total loss of production is the net value of the dryland crops that could be grown in a half wheat, quarter milo, quarter fallow rotation on this land. Hollinger has therefore been damaged in an aggregate amount of $3138.48, and Miller in an aggregate amount of $5100.03,

during the years 1975 through 1983, inclusive, as a direct and proximate result of the pollution escaping from the defendants' salt plant.

104. The Court further finds that restoration of this land would cost $65,000 at a price of $5000 per acre.

4. Pipeline Trespass on Cecil Miller's Land

105. The defendants buried a pair of pipelines that run, in part, under land owned by Cecil Miller. Originally, one pipeline carried recycle fluids to the brinefield from the plant and the other pipeline carried brine to the plant from the brinefield. The brine pipeline has since been abandoned, but remains under Miller's land. The recycle pipeline is still in use by the salt plant.

106. Miller failed to introduce credible evidence showing that he suffered actual damages because of the presence of the pipelines under his property. Damages for leaks from these pipelines are, of course, subsumed in the damages for lost crop profits and surface damage.

5. Stress, Aggravation, and Mental Anguish

107. Although the plaintiffs claim to be entitled to money damages for the stress, aggravation, and mental anguish they have suffered because of the pollution of their land and groundwater, they utterly failed to introduce any credible evidence to support such an award. In fact, the plaintiffs have failed to place any value on these supposed damages, even in their post-trial submissions. While the Court has no doubt that the plaintiffs have suffered stress and aggravation, and would be surprised if the plaintiffs were not anguished at discovering the enormity of the damage caused by the defendants' salt plant, the Court is unable to discern, with reasonable certainty, the monetary value of such emotions.

108. The plaintiffs have agreed to equitably apportion non-specific damages awards among themselves, as their interests as landowners and lessees may appear.

D. Punitive Damages

109. The corporate philosophy of American Salt's management, and of past president Otto Rueschhoff in particular, has consistently been one of increasing both production and profits while minimizing expenses unrelated to increasing production and profits. Although there is nothing inherently suspect about a corporation's striving for the maximum return for its shareholders, such activity carries the potential for causing injury to the rights of innocent third parties if carried to a socially unacceptable extreme.

110. Solution mining of underground salt is an activity with a very high potential for grevious harm to the environment and the rights of surrounding landowners if not performed with a high degree of care and a well-developed sense of social responsibility. Even though salt is beneficial to man and, in fact, is necessary for his survival, it becomes a deleterious substance when it invades the fresh water supplies of the people. Fresh water contaminated with salt becomes a poison to man, beast, and plant alike.

111. Salt is a particularly insidious pollutant of fresh water because it is very highly soluble, it has the ability to remain in solution indefinitely, and it is difficult to remove from solution once it has entered it.

112. Even though American Salt's management was fully cognizant of these properties of salt and the havoc that would be wreaked by massive salt pollution of the aquifer, they reached a conscious and reasoned business decision to maximize profits at the expense of the necessary and required preventative maintenance of their complex physical plant and equipment. It was perfectly foreseeable to American Salt's management—and was, in afct, foreseen by them—that deterioration of the physical plant and equipment would occur, and would result in pollution of the environment if not corrected by aggres-

sive routine maintenance. The physical plant and equipment were, nevertheless, allowed to deteriorate to the point where incidents of pollution were commonplace, everyday occurrences.

113. The record is rife with specific instances of pollution caused by the deterioration of the physical plant and equipment. Brine lines that sprung leaks were repaired with clamps instead of being replaced, even if "the line [was] so thin that it [was] almost impossible to put a clamp on it that [did] not leak a little brine," plaintiffs' exhibit 206.10. Hose breaks on the wellheads led to dramatic geysers of saturated brine. Despite the ongoing pollution from this sort of breakdown, the causes were invariably patched rather than permanently repaired.

114. The same corporate philosophy required cutting corners when major additions or repairs to the physical plant were undertaken. The pipelines buried under Cecil Miller's land are a typical example. Rueschhoff refused to allow those transite pipelines to be bedded in sand, as required by the manufacturer, because of the additional expense sand bedding would have incurred. This knowing and intentional refusal by Rueschhoff was the direct and proximate cause of the later breaks in those pipelines during seasonal changes. The pollution that escaped from those breaks was a perfectly foreseeable consequence of the improper and inferior manner in which the pipelines were installed. Even after the breaks started occurring and American Salt's management was on actual notice that the improper installation of the pipelines was directly causing pollution of the environment, Rueschhoff still refused to authorize sand bedding, even when sections of the pipelines were already dug up to be repaired.

115. The same cost-cutting measures exacerbated the pollution that did occur. For example, the solution min-

ing network incorporated an insufficient number of valves and controls, making it impossible, in many instances, to isolate a leaking component without completely shutting down the plant and halting production. Part of this difficulty was due to the massive interconnections in the active brinefields, but those interconnections were themselves the result of corner-cutting and profit-maximizing. When production was significantly raised to increase profitability, the major capital expense of drilling sufficient new wells to support that production rate was avoided by operating the existing wells in the reverse mode. While this tripled brine output with no major capital investment, it also caused the brinewells to interconnect in a shockingly short time, after only three percent of the available salt thickness had been mined. The decision to maximize profits by operating the wells in the reverse mode was a knowing and conscious one. The rapid interconnection of the wells—and the resulting loss of control over the brinefield and the inability to isolate leaks and other problems—was a perfectly foreseeable consequence. Once these problems combined, management had a strong incentive to tolerate pollution: shutting down the entire plant, and forfeiting production and profits, was such a drastic step that it was only undertaken in the most absolutely compelling of circumstances.

116. These difficulties are well illustrated by the incident concerning well 34. When the well was discovered to be communicating with both the active solution mining operation and the fresh water aquifer, American Salt's management was promptly notified of that fact. Because well 34 had interconnected with the active brinefield, the well could not be isolated for repair without shutting down the entire solution mining process. Shutting down the entire solution mining process meant forfeiting production and profits. Upper management therefore decided to ignore the problem and to continue operat-

ing the interconnected solution mining process without repairing well 34 until the next scheduled shutdown, still some six months in the future. American Salt's management made an intentional and reasoned decision to permit 250 gallons per minute of saturated brine to escape into the fresh water aquifer for six months, rather than to shut down the plant and repair the problem. This result was avoided only because a lower-level superintendent shut down the plant without authority and repaired the leaking well.

117. The philosophy of American Salt's management is further illuminated by the history of the emergency catch basin. The massive pollution that occurred when the vacuum pans were dumped during upsets was itself the result of a long-standing management decision to intentionally pollute the environment rather than permit the pans to plug up and thereby lose two days' production and the $60,000 required to unplug the pans. Once the decision to dump the pans rather than plug them up had been made, the pollution consequences could still have been completely avoided by constructing a low-technology emergency catch basin. Such construction cost money, however, and did nothing to increase production or profits. Rueschhoff therefore strenuously opposed the installation of the emergency catch basin, and finally capitulated only when the Kansas Department of Health and Environment [KDHE] promised to shut the plant down if the emergency catch basin were not built. Rueschhoff was proud of the fact that he did not do anything to prevent pollution until he was forced to do so by the State.

118. Rueschhoff's attitude towards the adjacent landowners who were bearing the brunt of the salt pollution was shocking. He viewed the farmers' continual complaints about American Salt's pollution as a potential threat to production and as a nuisance. When public outrage reached a critical level in early 1977, the KDHE held a public hearing concerning the National Pollution

Discharge Elimination System permit soon to be issued to American Salt. American Salt plant manager Bill Shirley appeared at the hearing and read a prepared statement that was extremely conciliatory and made sweeping statements that pollution from the plan had been abated and would not occur in the future. The citizens at the meeting were angry and hostile, and Shirley attempted to answer their questions and to make statements that would defuse their hostility. When Rueschhoff learned of these statements, he was dissatisfied with them because he felt the framers should have been told off, rather than accommodated. When Shirley replied that the landowners would get a court order shutting down the plant if pollution continued, Rueschhoff declared that he would get an injunction and be open again the next day, and that he would "run the creeks white with brine" if necessary to maintain production and fulfill the company's obligations to its paying customers.

119. Despite Rueschhoff's dissatisfaction, Shirley posted new operating instructions at the plant on March 17, 1977 that were designed to put the promises made at the public meeting into practice. The tenor of the instructions was to permit the vacuum pans to plug up, if necessary, to avoid polluting the environment. Rueschhoff was notified of these new instructions within a week of their posting, and made no comment.

120. The new instructions were put to use for the first time in April of 1977. The city water main to the plant broke, and cooling water to the circulation pumps on the vacuum pans was lost. To prevent burning out the pumps, the operators shut the pans down. In accordance with Shirley's instructions, however, the pans were not dumped, and were allowed to plug up. Production was lost for forty-eight hours and $60,000 was spent to unplug the pans. Rueschhoff's reaction was one of outrage. He informed Shirley that he would never

tolerate having the pans plugged again, and directed Shirley to operate the pans without regard to the pollution laws if that was necessary to keep from plugging the pans. In Rueschhoff's opinion, dumping the pans and taking the maximum fine that the KDHE could impose for any one event—$10,000—was a much better deal than plugging the pans, spending $60,000 to unplug them, and losing two days' production. Rueschhoff made a conscious and reasoned decision to pollute the environment and take the occasional $10,000 fine as a cost of doing business.

121. When he was personally confronted by angry landowners, Rueschhoff preferred to employ a strategy of intimidation. His ability to do so was substantially enhanced by the central position of American Salt in the Lyons economy and by the vast resources commanded by the corporate shareholders of American Salt. Thus, for example, when Cecil Miller finally threatened legal action against American Salt, Rueschhoff dared Miller to file suit and boasted that the money and lawyers available to American Salt would enable it to drag any litigation out for years, bankrupt Miller in the process, and take his land from him. It appears that at least the first part of this boast was not an idle one.

122. After a somber reflection on the evidence and testimony in this case, and a careful assessment of the credibility of the various witnesses, this Court finds that Rueschhoff operated the salt plant with a full and informed realization of the imminence of the danger it posed to the environment and the rights of the plaintiffs, and that he operated the plant on a day-to-day basis with an attitude that ranged from a complete indifference to the foreseeable consequences at its best, to a reckless disregard of the plaintiffs' right at its worst. With regard to many aspects of the plant operations, for example, dumping the vacuum pans during upsets, the Court finds that Rueschhoff intentionally performed acts

that damaged the plaintiffs and the environment, that he acted with full knowledge of the damage that would ensue, and that, he acted without sufficient cause or excuse.

123. Cudahy and General Host not only had actual knowledge that Rueschhoff was operating their plant in this manner, but were in fact responsible for their plant being operated in this manner. Rueschhoff was deeply committed both to salt mining as a business and to the continued existence of American Salt as a going concern. Cudahy and General Host were committed to neither. In order to survive, American Salt had to promise —and deliver—constantly increasing profits to the corporate holders of its stock, because that is what those holders were committed to. In order to deliver constantly increasing profits, American Salt had to economize to a dangerous degree in areas so crucial to pollution control as maintenance, repair, and capital improvements, and had to operate the plant in an irresponsible manner to continually increase production.

124. Cudahy and General Host were hardly passive investors in and ordinary stockholders of American Salt. Quite to the contrary, both companies were very deeply involved in the budgetary and financial aspects of American Salt's operations. Although American Salt maintained its own board of directors and complied on the surface with the requisite corporate formalities, it was incapable of concerted effort absent approval by Cudahy or General Host. Budgets were developed by American Salt's management and subjected to approval by Cudahy or General Host. After General Host's 1972 acquisition of Cudahy and American Salt, all of American Salt's budgets were submitted directly to General Host. Capital improvements had to be justified on a profit basis and approved by General Host before they could be implemented. Profits and losses were not reported on a tax return by American Salt, but were instead reported di-

rectly to General Host, which claimed American Salt's profits and losses on General Host's tax return. Although substantial funds were spent to modernize the American Salt facility and greatly increase its productive capacity, no money was spent on items related solely to pollution control unless the State was applying pressure for a particular project.

125. In addition to placing intense profit pressure on American Salt's local management and exercising substantial independent control over American Salt's budgetary and financial operations, General Host also kept itself apprised of the major day-to-day operations of American Salt and the state of the pollution problems. Field trips to Lyons were routinely made by General Host executives. General Host's supervisory activity was so detailed that even the public statement read by Shirley at the KDHE's public hearing in early 1977 received prior review and approval by General Host executives. General Host received actual notice of the numerous monetary fines imposed on American Salt by the KDHE, one of which was for the maximum amount allowed by law, and of the factual basis supporting those fines. In short, General Host was fully informed about the pollution that was occurring at the American Salt plant, General Host did nothing to halt that pollution, and General Host actively participated in the formulation of the public face displayed by American Salt to the plaintiffs in this case, the citizens of the state, the State itself, and this Court.

126. General Host also received direct and actual notice of the manner in which the plant was being operated from Rueschhoff's subordinates. A provision in General Host's procedures manual provided a mechanism for junior executives to bypass their superiors and to report directly to General Host if any senior executive ordered a subordinate to take actions contrary to state or federal law. When Rueschhoff directed Shirley to operate the

vacuum pans without regard to the pollution laws of the state of Kansas, Shirley responded by sending a letter of resignation to Rueschhoff. Shirley also mailed a copy of the resignation letter and a cover letter directly to the head of General Host's corporate legal department.

127. By mailing a copy of his very serious charge directly to General Host, Shirley put General Host on actual notice that its salt plant was being operated under instructions from the highest level of local management to intentionally pollute the environment and to intentionally violate the rights of adjacent landowners if such pollution was economically advantageous for American Salt. General Host nevertheless limited its investigation to having a delegate telephone Rueschhoff directly. Of course, Rueschhoff denied making the statements Shirley attributed to him. Amazingly, General Host terminated it investigation at that point. No one from General Host even contacted Shirley for his version of the events, let alone members of lower management or employees. When Shirley again took the initiative and called General Host directly five days later, he was told that his letter had been received and that General Host was satisfied with the manner in which Rueschhoff was handling the pollution problems at the plant. Later that day, Rueschhoff accepted Shirley's resignation.

128. By virtue of its actual notice of the pollution occurring at American Salt's plant, its refusal to take steps to correct that pollution, and its active participation in the management affairs of American Salt, General Host effectively ratified Rueschhoff's past acts and authorized him to continue to operate the plant in the same manner in the future, despite the fact that his complete indifference to and reckless disregard of the environment and the rights of the adjacent landowners made him unfit to direct the policy and activities of the corporation.

129. The Court finds that any award of punitive damages, to adequately punish the corporate wrongdoers and

to serve as a credible example to restrain and deter others from engaging in similar conduct, must be determined with due regard to the net worth of the defendants. Evidence of General Host's financial condition was introduced at the trial. In view of the considerable financial resources controlled by General Host and its net assets of over $450,000,000, the Court finds that an appropriate punitive damage award would amount to $10,000,000.

E. Alternative Remedies

130. The plaintiffs in this lawsuit have an attachment to their land that runs considerably deeper than the mere financial value of the property. Considerable evidence was introduced to show that this property is unusually well-suited for farming because of its high-quality soil, level terrain, and easy access to a constantly recharging source of fresh underground water. Considerable pride is involved in owning property of this quality. In addition, the sons and daughters of some of the plaintiffs are the fourth generation of their families on their parcels. The value of this family history is, of course, extremely difficult to estimate.

131. The plaintiffs also made it abundantly clear that, if they had the power to select any remedy they wanted, they would choose to have the water under their properties restored and once again fit for irrigation and domestic uses. The plaintiffs do not view this litigation as a get-rich-quick opportunity. Instead, they desire only to farm their own land, unfettered by the salt plant's activities.

132. An award of the damages suffered by the plaintiffs because of their inability to irrigate is appropriate in this case because it directly addresses the rights that American Salt violated by introducing the pollution into the groundwater. An award of punitive damages, on the other hand, would serve to punish and deter American Salt, but would do nothing directly to address the vio-

lated rights. The plaintiffs would likewise be hard-pressed to directly address those rights were each plaintiff granted a fraction of a punitive damage award. The pollution presently existing in the aquifer is a problem that can only be effectively addressed in terms of the area as a whole, rather than as individual tracts.

133. The Court also finds that important societal interests mingle in this controversy. While the plaintiffs have suffered a direct injury, the state has also been injured by the damage done to a valuable natural resource. The problem is also not limited just to the plaintiffs in this lawsuit and the land they own or lease. Because the aquifer flows, the salt dissolved in it will continue to move downstream unless steps are taken to exact that salt. Thus, increasing numbers of the state's citizens will be injured as the pollution continues to spread. The aquifer joins the Arkansas River at Hutchinson, and that river then flows through Wichita, the largest city in Kansas, before entering the state of Oklahoma. The pollution will make this journey if affirmative steps are not taken to abate it.

134. There is a very high probability that remedial measures could prove effective in removing a substantial amount of the pollution from the aquifer at a reasonable cost well within the range of the defendants. Dr. Dan Raviv, an eminent geohydrologist, was an expert witness for the plaintiffs. His curriculum vitae and extensive courtroom testimony on most of the essential issues in this case were very impressive and were found to be very highly credible by the Court in reaching these findings of fact. Dr. Raviv identified nine possible strategies for removing the pollution, ranging from doing nothing to installing desalinization facilities, and roughly predicted their costs and results. *See* plaintiffs' exhibit 275. The practicality of remedial measures is demonstrated by the large quantity of salt inadvertently removed from the

aquifer by the salt plant with the water it intentionally pumps for its various plant processes. While the defendants point to this removal as support for their anserous argument that they deserve "credit" against the pollution they intentionally introduce into the aquifer for the pollution they quite incidentally remove from the aquifer with their process water, the Court views this removal as an actual demonstration of the feasibility of remedial measures. The Court is very impressed with this entire subject matter and finds that the various clean-up strategies have a substantial potential to benefit all of the parties tc this case, as well as the state. If the pollution were removed from the aquifer, the plaintiffs would benefit by having clean water at their disposal; the defendants would benefit by halting future liability, both to the present plaintiffs and to the large class of potential plaintiffs who have not yet been injured by the advancing pollution; and the state would benefit by the restoration of its natural resource and the vindication of the rights of its citizens.

135. Throughout the trial, American Salt insisted that it was and is a responsible corporate citizen. In the Court's view, this assertion could be vindicated by American Salt's taking the responsibility upon itself to make a careful investigation of the various clean-up alternatives and by American Salt's making a substantial good-faith effort to implement and carry through to conclusion the best of those alternatives. The first step must be the installation of a well-designed system of monitor wells, so that the nature and extent of the problem can be precisely outlined. American Salt has voluntarily agreed to participate in the installation of such a system. The Court approves of this procedure and finds that American Salt should be given a meaningful opportunity to assess the alternatives, determine the nature and extent of the existing pollution, and select the most appropriate strategy for repairing the damage.

136. The Court further finds that holding a final judgment as to punitive damages in abeyance, contingent on the feasibility of restoring the aquifer to an unpolluted condition and American Salt's good-faith efforts to accomplish and finance such a restoration, would act as a strong incentive for properly performing those good-faith efforts.

F. Statute of Limitations

137. As previously mentioned, American Salt filed a very substantial motion for partial summary judgment based on the expiration of the applicable statute of limitations, which this Court squarely rejected some nine months before trial. Despite this unequivocal ruling, the defendants continued to press the statute of limitations defense and spent considerable time during the trial introducing evidence whose only possible relevance was to the application and operation of the statute of limitations. Because of these continuing attempts by the defendants to revitalize and rehabilitate this defense, and because some of the testimony introduced during the trial concerning the defense was relevant, the Court will briefly reexamine this area.

138. Application of the traditional notions embodied in statutes of limitations to the facts of this case is troublesome and difficult. The difficulty can be traced, in large part, to the unique interrelationship between the acts committed by the defendants, the glacial movement of the water in the aquifer, and the physical location of the plaintiffs. An act of pollution can be committed by the defendants on their own property in a matter of hours or days. Once that pollution is introduced into the aquifer, it is carried downstream regardless of whether the defendants continue to commit acts of pollution or halt those acts. The movement of the water in the aquifer amounts to inches per day, taking approximately ten years to travel one mile if not influenced by pumping. Some of the plaintiffs' properties in this case are more

than five miles from the salt plant, and more than three miles from the closest corner of the new brinefield.

139. The statute of limitations could arguably start to run when an act of pollution is committed, or when the pollution in the aquifer leaves American Salt's property, or when the pollution front or a particular surge of pollution physically passes a particular plaintiff's property line, or when pollution prevents a plaintiff from doing something he would otherwise have done, such as irrigate a growing crop. Because the statute specifically provides that no cause of action accrues "until the act giving rise to the cause of action first causes substantial injury," K.S.A. § 60-513, a similar difficulty arises in attempting to determine what has been injured and when that injury first became substantial. A truly deplorable amount of energy and highly trained legal talent has been wasted in this case bickering over the almost endless permutation of these numerous variables. The problem has been exacerbated by the inconsistent and unprincipled Kansas case law on the subject, as this Court has previously lamented at great length.

140. In this Court's view, applying any rigid and mechanical limitations period to the facts of this case has the potential to work substantial injustice. If the statute begins to run when an act of pollution is committed, the two-year limitations period would expire, in many instances, before the resulting polluted groundwater ever left American Salt's property: in two years, the aquifer travels only about a thousand feet. If the statute begins to run when the polluted groundwater leaves American Salt's property, no one but the landowners within a thousand feet of American Salt's property could ever have a cause of action, despite the obvious injuries suffered by more remote landowners. If the statute begins to run when the pollution front first passes a particuar plaintiff's property line, a determination of all future damages from that moment on would have to

be made, despite the fact that the natural flow of the groundwater will carry that particular pollution away. If the statute begins to run when a particular surge of pollution passes a particular plaintiff's property line, the future damages problem is joined by nearly insoluble problems of definition, causation, and damage allocation. Regardless of when the statute begins to run, the facts remain that the defendants are responsible for the pollution and the plaintiffs, without fault of their own, are damaged by the pollution.

141. In order to better argue their defense, the defendants have persisted in defining the damage they have don as damage to the aquifer *per se*. The Court views this definition as the root of the probems encountered in attempting to apply the statute of limitations to the facts of this case. Once the damage is so defined, it is fairly expedient to argue that the damage is "permanent," as that term is used as a term of art in Kansas statute of limitations jurisprudence, and that such "permanent" damage is barred by the statute of limitations. The Cout regards this view as a gross oversimplification of the problem. The salt dissolved in the groundwater is not harmful in and of itself. The salt pollution does not make the surface uninhabitable. Likewise, the plaintiffs are not water merchants whose plans to reduce the groundwater to their possession for sale as a valuable commodity have been frustrated directly by the pollution. The effect is not the same as if the plaintiffs had contaminated American Salt's salt deposits with radioactive wastes and rendered those salt deposits worthless. The plaintiffs are farmers. Their only interest in the groundwater is in its ability to provide moisture to their growing crops. The Court finds that the injury suffered by the plaintiffs is the injury to those growing crops caused by the inability to irrigate them, which is, in turn, caused by the presence of the salt in the groundwater. The plaintiffs suffer no injury from the abstract and ethereal

damage to the substrata of their property. If the entire area at issue in this lawsuit were covered by a gargantuan suburban shopping mall with commodious parking ots, there would be no injury from the pollution, just as there is no injury to anyone now when the highly polluted effluent injected by the defendants into the Arbuckle moves under the property of various individuals at a depth of 4000 feet.

142. Regarding the injury suffered by the plaintiffs as the injury done to their growing crops conforms the available remedies between these parties to the reality of their relationship. No one seriously disputes that all of the present plaintiffs' groundwater will naturally clear sufficiently for irrigation use within twenty to thirty years of the last acts of pollution. It is also very probable that this period could be cut in half, or perhaps by as much as three-quarters, if remedial action were undertaken. Permitting the plaintiffs to regularly recover their ascertainable crop damages will serve both to compensate them for the acutal harm they have suffered as a direct consequence of the defendant's activities, and to vindicate society's right to an unpolluted environment by refusing American Salt a license to pollute and encouraging American Salt to undertake the repair of the damage it has already done.

143. Providing the defendants with an absolute immunity based on the statute of limitations would be particularly shocking in light of the continuing pollution that this Court has found to be emanating from the plant. The lack of direct causal link between the pollution escaping today from the plant and the injury suffered today by a farmer because of pollution that escaped one or ten years earlier is completely immaterial. What is material is the direct causal link between the polluting acts of the defendants and the injuries suffered by the plaintiffs. Regardles of when the polluting acts occurred, and regardless of society's changing views on the propri-

ety of polluting the environment over the years, the defendants have never had a right to pollute the groundwater and they have never had a right to intentionaly injure the surrounding landowners with impunity. The physical fact that the aquifer moves slowly is not a valid defense for the pollution that has occurred and continues to occur.

144. The plaintiffs will continue to suffer compensable damages so long as the annual crops they grow—or the annual crops that they could grow, but for the pollution—continue to be damaged by the polluted condition of the groundwater. As each annual crop is damaged, a cause of action for that damage will accure, and each plaintiff must file a claim on that cause of action within two years.

145. The Court further finds that the defendants have engaged in active and assertive conduct that is relevant to the application of the statute of limitations. In particular, the Court finds that the defendants consciously adopted a policy of making statements that were known to be false when made, such statements being intended to mislead potential plaintiffs and to induce them to slumber on their rights.

146. The most egregious of these false statements was the oft-repeated assertion by American Salt's management that all pollution at the plant had ceased and that the pollution in the groundwater would clear and dissipate within "several years." These statements first surfaced in 1958, after American Salt had completed its first efforts at controlling its pollution of the environment. They were, in the normal course of affairs, made by American Salt to Norman Biegler, a state official of the KDHE. Biegler foreseeably gave the statements wide distribution, *see, e.g.*, defendants' exhibit B-60a.

147. Potential plaintiffs who heard that the salt plant was no longer polluting and that the pollution in the equifer would clear within "several years" were misled

by those statements and detrimentally relied on them by abstaining from promptly filing suit.

148. A further example of this policy of making intentional misstatements and concealing material information can be found by examining the various drafts of the engineering report prepared by Wilson & Company. In May of 1977, the KDHE, citing "the repeated failure of the American Salt Company and its staff to solve its pollution problems," ordered the plant to hire a qualified engineering firm to examine the brinewells and brine transport system, groundwater pollution and stormwater run off, and the internal plan processes. *See* plaintiffs' exhibit 114. After examining these areas, the firm was to prepare a formal engineering report summarizing its findings and recommending remedial measures for the pollution sources it had identified. Wilson & Company of Salina, Kansas was hired for the job. American Salt employees were instructed to be polite to the Wilson & Company investigators and to answer their direct questions, but to never volunteer information.

149. A preliminary draft of the Wilson & Company report was completed in December of 1977, some nine months after this lawsuit was filed. *See* plaintiffs' exhibit 421. Instead of being submitted to the state, however, this preliminary draft was submitted to the management of American Salt. There, it underwent numerous revisions as suggested by management and legal counsel. The final report was completed in July of 1978, *see* defendants' exhibit R-5.

150. A careful comparison of the preliminary and final drafts reveals that substantial relevant information was stricken from the report by American Salt's management. Two subject areas were edited with a particularly heavy hand: the general introductory section of the original report, pages 1-1 through 1-12; and the groundwater control program section of the original report, pages 5-1 through 5-2 and figures 5-1 through 5-12.

151. The general introductory section, as originally written, contained many references to the probem posed by surface deposits of salt that could be dissolved by rain and percolated into the groundwater. Surface deposits were identified at the north dump site, exhibit 421 at 1-9, and covering some thirty-seven acres of the plant's surfact that had "been saturated with salt over the many years of operation," exhibit 421 at 2-1, 1-8. Frequent mention was made of the possibility of leaching and percolation from the surface salt scars around the brine wellheads, exhibit 421 at 1-4, 1-9, 1-10. Wilson & Company recommended that the drainage ditches, the area around the disposal well, and the areas around the brine-wells all be excavated and the contaminated soil safely encapsulated, exhibit 421 at 4-1, 4-2. Implicit in these comments was the realization that salt on the surface posed a genuine threat to the integrity of the aquifer. This Court has found that salt on the surface in fact resulted in substantial contamination of the aquifer. American Salt's management nevertheless deleted every reference to the surface salt scars, and went so far as to delete every reference to the possibility of surface salt leaching into the groundwater, with the exception of one vaguely worded reference concerning the north dump site, exhibit R-5 at 4-3. By eliminating these references from the final report, despite American Salt's actual knowledge that these sources were contributing to the contamination of the groundwater, American Salt essentially misrepresented that no threat was posed by these sources.

152. The groundwater control program section, as originally written, contained a brief general introduction, a description of the aquifer, an analysis of the groundwater quality data as derived from the state monitor wells, an identification of the sources of groundwater contamination, suggested control measures, and a complete set of charts showing the chloride readings in the

state monitor wells from 1968 to 1978, exhibit 421 at 5-1 through 5-2 and figures 5-3 through 5-11. This section was completely gutted in the final report: all that survived was part of the introduction, part of the aquifer description, and three of the accompanying figures. All references to the state monitor wells and the extent of the pollution in the aquifer were completely eliminated—even the location of the state monitor wells, shown in figure 5-12 of the original report, were blotted out in the corresponding figure 4-3 of the final report.

153. Wilson & Company identified two sources that they suspected of contributing to the groundwater contamination.

a. The surface run-off carries a high concentration of chloride which infiltrates into the groundwater.

b. Subsurface sources of potential pollution are the brine, waste, and recycle transport lines that may rupture and leak.

Exhibit 421, at 5-2. These suspicions have been borne out by the evidence in this case, which shows that substantial groundwater contamination occurred from both of these sources. American Salt's management nevertheless deleted the identification of these two sources from the final report, despite American Salt's actual knowledge that these sources were contributing to the contamination of the groundwater. By eliminating the sources from the final report, American Salt essentially misrepresented that no threat was posed by these sources.

154. If American Salt was without actual knowledge that these surface and sub-surface sources were contributing to the contamination of the groundwater, its intentional act of deleting those sources from the final report, and thereby deleting those sources from further consideration for remedial measures, without conducting any investigation to determine the true facts, evinces the

sort of reckless disregard for the rights of others, in the face of a known danger, that is highly relevant to the issue of punitive damages.

G. Miscellaneous Findings of Fact

155. In the course of the trial many assertions were made by the parties and many alternative theories were advanced. Individual comment on these matters would be time-consuming and feckless. Suffice it to say that the Court has given due consideration to the entirety of the record and proceedings before it, and that any assertion or theory not discussed in this Opinion has been considered and rejected, rather than overlooked.

156. The trial of this case was marred by many scurrilous accusations of professional and ethical misconduct by the attorneys involved in the long saga of this dispute. The Court expressly finds that these accusations were made in the heat of the moment, that they resulted from counsels' deep personal involvement in the case and the pressures of trial, and that they are completely without foundation in either fact of reality. From the Court's viewpoint, counsel for the parties were most competent in performing their duties, courteous and attentive to the Court, and scholarly in their written briefs. Counsel presented their respective theories of the case with expedition and excellence.

157. Any of the preceding findings of fact that are held to be operative only as conclusions of law shall be considered conclusions of law.

II. CONCLUSIONS OF LAW

1. This Court has jurisdiction over the parties to and subject matter of this dispute by virtue of the complete diversity of citizenship between the plaintiffs and the defendants and the requisite amount in controversy, 28 U.S.C. § 1332(a).

2. Venue is proper in this Court because all of the plaintiffs reside in this judicial district and the claims arose here, 28 U.S.C. § 1391( ).

3. The plaintiffs, as owners or tenants of the lands involved in this case, are entitled to the possession of those lands, and therefore have standing to bring this suit for injury to their possessory interests, *Klassen v. Central Kansas Co-operative Creamery Association*, 160 Kan. 697, 165 P.2d 601 (1946). The controversy between these parties is ripe and justiciable.

4. Under the laws of the state of Kansas, nuisance "is a field of tort liability rather than a type of tortious conduct," *Culwell v. Abbott Construction Co.*, 211 Kan. 359, 364, 506 P.2d 1191 (1973). The appropriateness of the "nuisance" label, on a particular set of facts, thus turns on the interests invaded and the harm inflicted, rather than on the nature or quality of the defendant's acts, *id.*

5. The Kansas Supreme Court has declared that a "nuisance is an annoyance, and any use of property by one which gives offense to or endangers life or health, violates the laws of decency, unreasonably pollutes the air with foul noxious odors or smoke, or obstructs the reasonable and comfortable use and enjoyment of the property of another, may be said to be a nuisance." *Allen v. City of Ogden*, 210 Kan. 136, 139-40, 499 P.2d 527 (1972).

6. A private nuisance "is a civil wrong, based on a disturbance of some right or interest in land." *Culwell*, 211 Kan. at 362, 506 P.2d 1191. A public nuisance, in contrast, "must affect an interest common to the general public rather than peculiar to one individual. Stated another way, a public nuisance is one which annoys a substantial portion of the community," *id.* at 363, 506 P.2d 1191.

7. A nuisance *per se* "is an act, instrument, or structure in which is a nuisance at all times and under any circumstances," *Vickridge Homeowners Association, Inc. v. Catholic Diocese of Wichita*, 212 Kan. 348, 355, 510 P.2d 1296 (1973). A nuisance *per accidens* or nuisance in fact "is an act, instrument, or a structure which becomes a nuisance by reason of surrounding circumstances," *id.*

8. The salt plant located southeast of Lyons, Kansas and owned and operated by the defendants is a nuisance. The escape of great quantities of salt from the plant and the invasion of the fresh groundwater by that salt annoys the surrounding landowners, endangers their health and their businesses, violates the laws of decency, and unreasonably obstructs their lawful and reasonable use and enjoyment of their lands for agricultural purposes. The interference with the plaintiffs' use and enjoyment of their lands is substantial.

9. The salt plant is primarily a private nuisance, inasmuch as the rights of the plaintiffs to use and enjoy the property at issue in this lawsuit are the rights that have primarily been disturbed by the pollution released by the defendants. Elements of a public nuisance also mingle in this controversy, because the pollution released by the defendants has wrought substantial damage to a precious natural resource and thereby infringed the public interest in maintaining the state's water resources in a pure and unpolluted condition.

10. The salt plant is not a nuisance *per se:* if operated in a careful and prudent manner, the plant would not be a nuisance at all. The plant is a nuisance *per accidens:* it is a nuisance because of the surrounding circumstances under which it has been and is being operated. The nuisance *per accidens* label is also appropriate because the pollution escaping from the plant could be prevented, and the nuisance thereby abated.

11. Because the defendants own and operate a private abatable nuisance *per accidens*, they are liable for the actual damages flowing from that nuisance, *Newman v. Nelson*, 350 F.2d 602, 604-05 (10th Cir.1965) (construing Kansas law).

12. Alternatively, the Court concludes that the escape of the salt into the groundwater would not have occurred in the absence of negligence or some more culpable conduct, that the plant was at all times within the exclusive control and possession of the defendants, and that the plant was operated in a manner that, at a minimum, rose to the level of negligence. It is a general principle that defendants are liable for the actual damages flowing from their negligence, *see e.g., Noel v. Menninger Foundation*, 175 Kan. 751, 762, 267 P.2d 934 (1954).

13. Because pollution continues to emanate from the salt plant in legally significant quantities, it is a continuing nuisance. Because the salt plant is a continuing abatable nuisance, it gives rise, over and over again, to causes of action to recover for the injuries sustained by the surrounding landowners in the statutory period immediately preceding the filing of the suit, *Miller*, 567 F.Supp. at 906, and cases cited therein.

14. The injury suffered by the plaintiffs in this case has primarily manifested itself in the damage done to the plaintiffs' growing crops, or in the plaintiffs' inability to grow certain crops at all. Such injuries constitute compensable damages, measured by the value of destroyed crops and the difference, caused by the injury, in the value of injured crops. *Sayers v. Railway Co.*, 82 Kan. 123, 126, 107 P. 641 (1910). Annual crops can only be injured or destroyed in the year in which they grow, so each injury or destruction gives rise to a separate cause of action, and sequential injury to or destruction of several sequential annual crops gives rise to several sequential causes of action.

15. The plaintiffs have fully mitigated their damages by growing dryland crops on the affected land. *Iseman v. Kansas Gas and Electric Company*, 222 Kan. 644, 567 P.2d 856 (1977); *Theis v. duPont, Glore Forgan, Inc.*, 212 Kan. 301, 510 P.2d 1212 (1973); *Steele v. J.I. Case Company*, 197 Kan. 554, 419 P.2d 902 (1966).

16. The Court concludes that the defendants are liable to the plaintiffs in the amount of $3,060,000 for the temporary damages to the plaintiffs' annual crops wrought by the defendants' continuing abatable nuisance in the period from May 31, 1975, the date to which the two-year statute of limitations found at K.S.A. § 60-513 extends from the date the original complaint in this case was filed, to December 31, 1983. The plaintiffs will equitably apportion this award among themselves as their interests may appear.

17. Certain plaintiffs have suffered consequential damages because of the operation of the defendants' continuing abatable nuisance. The defendants are liable for these damages because they are the natural and probable result of the maintenance of the nuisance, *see, e.g., Ettus v. Orkin Exterminating Co.*, 233 Kan. 555, 562, 665 P.2d 730 (1983); *Foster v. Humburg*, 180 Kan. 64, 68, 299 P.2d 46 (1956).

18. The Court concludes that the defendants are liable for the following consequential damages: $5000 to Ed Tobias for damages to a domestic water well, $2000 to Lyle Brothers for damages to two domestic water wells, and $42,500 to Lyle Brothers for damages to his dairy operation. The damages to Brother's dairy included in this figure are those incurred between May 31, 1975 and December 31, 1983.

19. Certain plaintiffs have suffered damages because of brine flowing over their lands. The defendants are liable for these damages because the release of brine onto neighboring lands is a physical trespass. *See, e.g., Riddle*

Quarries, Inc. v. Thompson, 177 Kan. 307, 311, 279 P.2d 266 (1955).

20. The Court concludes that the defendants are liable for the following damages resulting from brine trespasses: $3138.48 to Delbert Hollinger and $5100.03 to Cecil Miller. The figures include trespasses between May 31, 1975 and December 31, 1983. The Court further concludes that the cost of restoring this land is unreasonable, and that such restoration costs are, therefore, an improper measure of the damages actually suffered.

21. Cecil Miller suffers a trespass on his land by two of the defendants' pipelines. The defendants are liable for this continuing trespass, *Riddle, supra.*

22. Cecil Miller failed to introduce any credible evidence of actual damage from this trespass apart from his crop damages, for which he has already been compensated. Miller is, therefore, entitled to only nominal damages for this trespass, *Longenecker v. Zimmerman*, 175 Kan. 719, 721, 267 P.2d 543 (1954).

23. The Court concludes that the defendants are liable for their trespassing pipelines to Cecil Miller in the amount of $1.

24. The plaintiffs failed to carry their burden of proving their entitlement to the other consequential damages they sought, or their entitlement to damages for stress, aggravation, and mental anguish. The Court therefore concludes that the defendants are not liable to the plaintiffs for these damages.

25. The law of Kansas permits an award of punitive damages "when the elements of fraud, malice, gross negligence or oppression accompany the wrongful act. Such damages are awarded to punish the wrongdoer for his malicious, vindictive, willful or wanton invasion of the injured person's rights. They also serve as an example to restrain and deter others from the commission

of such wrongs." *Kline v. Multi-Media Cablevision, Inc.*, 233 Kan. 988, 989, 666 P.2d 711 (1983).

26. "Wantonness" means a reckless disregard for the rights of others, *Cope v. Kansas Power and Lights Co.*, 192 Kan. 755, 760-61, 391 P.2d 107 (1964), and may be "characterized by a realization of the imminence of damage to others and a restraint from doing what is necessary to prevent the damage because of indifference as to whether it occurs," *Boehm v. Fox*, 473 F.2d 445, 447 (10th Cir.1973) (applying Kansas law).

27. "Maliciousness" may be defined as "the intentional doing of a wrongful act with full knowledge of its character, and without cause or excuse," *Donley v. Amerada Petroleum Corp.*, 152 Kan. 518, 524, 106 P.2d 652 (1940).

28. The indifferent, persistent maintenance of a nuisance with a reckless disregard for the rights of others is an appropriate basis for the imposition of punitive damages, *Newman v. Nellson, supra.*

29. Corporations may be held liable for punitive damages arising from the conduct of their employees if "(a) the corporation or its managerial agent authorized the doing and manner of the act; (b) the employee was unfit and the corporation or its managerial agent was reckless in employing or retaining him; (c) the employee was employed in a managerial capacity and was acting in the scope of employment; or (d) the corporation or its managerial agent ratified or approved the act of the employee," *Kline v. Multi-Media Cablevision, Inc.*, 233 Kan. at 994, 666 P.2d 711 (1983).

30. Because Rueschhoff realized the imminence of the danger to the surrounding landowners of salt escaping into the fresh-water aquifer and did nothing to prevent that escape because of indifference to the surrounding landowners' rights, Rueschoff wantonly invaded those

rights. Intentional acts of pollution, such as dumping the vacuum pans during upsets, were done with a full knowledge of the damage that would be done and without cause or excuse, and were therefore done maliciously. Punitive damages are, therefore, appropriate on the facts of this case.

31. Because General Host authorized Rueschhoff to do these acts; recklessly retained him despite his unfitness to manage the plant; ratified his acts of pollution; and employed him in a managerial capacity, in the scope of which the acts of pollution were committed; General Host is liable for the punitive damages arising from Rueschhoff's conduct. *Kline, supra.*

32. The Court concludes that the facts and circumstances of this case are such that the Court should exercise its discretion to find the defendants liable to the plaintiffs for punitive damages, in the amount of $10,000,000.

33. The plaintiffs have invoked the equitable jurisdiction of this Court by praying for injunctive relief. The Court concludes that this invocation of equitable jurisdiction is appropriate because of the continuing trespass by the defendants' pipelines on Cecil Miller's land, *see, e.g., Provident Mutual Life Insurance Company of Philadelphia v. State Highway Commission*, 155 Kan. 351, 354, 125 P.2d 346 (1942), and the persistent maintenance of a continuing private nuisance, *see, e.g., Buckmaster v. Bourbon County Fair Association*, 174 Kan. 515, 256 P.2d 878 (1953). A district court sitting in equity has broad powers to devise and fashion a remedy between the parties before it that works substantial justice between them, settles the matters in controversy, and prevents further litigation. *Stady v. Texas Company*, 150 Kan. 420, 425, 94 P.2d 322 (1939); *Puritan-Bennett Corp. v. Richter*, 8 Kan.App.2d 311, 315, 657 P.2d 589 (1983); *In re Miller*, 5 Kan.App.2d 246, 258-59, 616

P.2d 287, *affirmed in part and reversed in part on other grounds*, 228 Kan. 606, 620 P.2d 800 (1980).

34. The continuing trespass by the defendant' pipelines on Cecil Miller's property must come to an end. The Court will, therefore, enjoin the continuation of this trespass, and will order the defendants to cease using the offending pipelines and to remove them from Miller's land. Because removal of the pipelines will cause damage to the surface of Miller's land, the Court will grant Miller the option of permitting the abandoned pipelines to remain buried under his property if he so wishes.

35. In the further exercise of its equitable jurisdiction, this Court concludes that substantial justice would best be worked between these parties if the defendants could accomplish, at their own expense, the removal of a substantial majority of the salt from the aquifer. The removal of the salt from the aquifer would settle the most significant matter in controversy between these parties, restore them to their respective positions before the nuisance was created, and prevent further biannual litigation of the matters of concern in this lawsuit. This Court has the equitable power to order the defendants to undertake such a clean-up.

36. At the present time, the Court is without sufficient knowledge or information to order the defendants to undertake any particular remedial program. Additional work by competent experts is needed to determine the existence, cost, efficacy, and feasibility of the various clean-up strategies that are or may be available to the defendants. The first step for any strategy *is* known to the Court, however: a well-designed system of monitor wells must be installed in the aquifer to determine the nature and extent of the pollution damage and to focus the requirements for the clean-up effort. The Court will, therefore, order the defendants to undertake the installation of such a system, in cooperation with an expert designated by the plaintiffs.

37. Were the defendants to make a conscientious, good-faith, and realistic effort to address an remedy, within a reasonable time, the pollution presently existing in the aquifer, such an effort would be extremely relevant to this Court's assessment of the defendants' state of mind and to the appropriateness of the award of punitive damages that this Court has found to be fully justified on the facts of this case. In the exercise of its broad equitable powers, this Court concludes that the ends of substantial justice would best be served by holding the final judgment as to the punitive damage award temporarily in abeyance, pending the defendants' good-faith efforts to define and remedy the pollution they have caused. The Court will retain jurisdiction over this case and the punitive damage award to the fullest extent permitted by law while the clean-up alternatives are investigated and implemented, and may activate by a final judgment the punitive damage award, in whole or in part, at any time that it become apparent that the defendants are not pursuing the clean-up effort in good faith, or at any time that it become apparent that any clean-up effort is impossible for either scientific or financial reasons.

38. The Court concludes that, in the event the statute of limitations is deemed to apply to the claims of the plaintiffs in this case in such a way as to completely bar those claims, the facts and circumstances shown by the evidence clearly demonstrate that the statute of limitations should be equitably tolled and that the defendants should be equitably estopped from relying on the statute of limitations defense. *See, e.g., Newton v. Hornblower, Inc.*, 224 Kan. 506, 516, 582 P.2d 1136 (1978).

39. Because the Court must retain jurisdiction over the punitive damage award and the clean-up effort, no final judgment as to all claims, rights and liabilities of these parties can be entered at this time. However, the Court expressly determines that there is no just reason

to delay the entry of a final judgment on the issues of liability and the amount of actual damages, and that the entry of such a final judgment would permit an appeal to proceed concurrently with the installation of the monitor well system and the preliminary engineering work on the clean-up alternatives. Such a concurrent appeal would be in the best interests of all concerned. The Court, therefore, will expressly direct the entry of a final judgment on the issue of liability and actual damages, pursuant to Rule 54(b) of the Federal Rules of Civil Procedure.

40. Any of the preceding conclusions of law that are held to be operative only as findings of fact shall be considered findings of fact.

COMMENT

In sum, after many years of delay and monumental discovery proceedings, this case culminated in a protracted and most adversarial trial. The evidence presented and the trial strategy employed by the defendants were unique: the defendants virtually admitted their pollutive acts over many decades and relied on a statute of limitations defense to excuse environmental conduct in their salt business that can only be termed deplorable, and that caused massive damage to the plaintiffs in this case. In the last analysis, the facts in this case certainly portray the validity of a well-known agricultural adage: "Before you can clear up the water you must first kick the hog out of the spring." The judgment of liability, the determination of actual damages and of conduct warranting punitive damages, the assessment of punitive damages, and the holding of those punitive damages in abeyance pending the Court's continuing effort to fashion an effective equitable remedy to restore the aquifer and prevent the spread of the pollution, are all sincere judicial attempts to vindicate that adage.

FINAL JUDGMENT

1. IT IS THEREFORE ORDERED that the defendants are liable to the plaintiffs as a group of actual damages to growing crops in the amount of $3,060,000.00.

2. IT IS FURTHER ORDERED that the defendants are liable to the following particular plaintiffs for the following actual damages:

(a) To Ed Tobias for damage to a domestic water well, $5,000.00.

(b) To Lyle Brothers for damage to two domestic wells, $2,000.00

(c) To Lyle Brothers for damage to his dairy operation, $42,500.00

(d) To Delbert Hollinger for brine trespasses on the surface of his land, $3,138.48.

(e) To Cecil Miller for brine trespasses on the surface of his land, $5,100.03.

(f) To Cecil Miller for pipeline trespasses under his land, $1.00

3. IT IS FURTHER ORDERED that the defendants are liable to the plaintiffs as a group for punitive damages in the amount of $10,000,000.00

4. IT IS FURTHER ORDERED that the preceding award of puntive damages be held in abeyance pending evaluation and assessment of the potential clean-up alternatives, and that this Court retain jurisdiction over the punitive damages award until further order of this Court. In the event that the punitive damages award made herein is activated in whole or in part, depending on future events in the Court's invocation of its equitable powers to restore the aquifer, then such award as finally determined shall relate back to the date of this opinion and bear interest at the legal rate from and after August 13, 1984.

5. IT IS FURTHER ORDERED that the defendants forthwith undertake the installation of a monitor well system in consultation with an expert to be designated by the plaintiffs, and possibly an additional independent expert to be selected by the Court, and forthwith undertake the assessment and evaluation of the potential clean-up alternatives. This Court shall retain jurisdiction and supervision of these undertakings. The defendants, in cooperation with the expert designated by the plaintiffs and any selected by the Court, shall file progress reports with this Court at least every other month, to keep this Court fully informed of the progress being made in these undertakings. A final report on the available scientific clean-up alternatives shall be filed with the Court within eight months of the date on which this Opinion and Order is filed. Promptly after this report is filed this Court shall order the defendants to undertake the most appropriate of the clean-up alternatives. All of the parties to this suit will have a full opportunity to be heard on the issue of which clean-up alternative is most appropriate under the facts and circumstances of this case.

6. IT IS FURTHER ORDERED that the judgment of liability and the judgment for actual damages be certified as final appealable judgments pursuant to Rule 54 (b) of the Federal Rules of Civil Procedure.

APPENDIX E

UNITED STATES DISTRICT COURT
D. KANSAS

Civ. A. No. 77-1212

CECIL W. MILLER and MILDRED E. MILLER, Joint Tenants; MARGARET L. BIRCHENOUGH, Testamentary Trust, DONALD L. BIRCHENOUGH, ANSEL TOBIAS and WALTER WRIGHT, Trustees; RUTH M. HOLLINGER, Individually and as Joint Tenant with DELBERT HOLLINGER; JOHN E. EDWARDS and KERMIT C. EDWARDS, Joint Tenants; HOMER SHARPE; CECIL M. TOBIAS and FRANCES TOBIAS, Joint Tenants; PAUL F. WESTRUP and ARDIS B. WESTRUP, Joint Tenants; JAY BROTHERS; LYLE BROTHERS, Individually and as Joint Tenant with PATRICIA R. BROTHERS; ALVIN ENGELLAND; ANSEL ENGELLAND; JACK ENGELLAND and VIVIAN M. ENGELLAND, Joint Tenants; GERALD M. JONES and DONNA JONES, Joint Tenants; ROBERT A. JOHANNSEN; RAYMOND E. TOBIAS; GARY ZWICK; LESTER COLLE; HARVEY WILLHAUS and MARILYN WILLHAUS, Joint Tenants; WILMOR H. ODEN; RAPHAEL ROEDER and ANNABELLE A. ROEDER, Joint Tenants; EDRIS EDWARDS; EDWARD F. JANDA and ANNA MAE JANDA, Joint Tenants; HARRY ZWICK; ARTHUR H. ODEN; JOLEEN J. OTTLINGER; and WILLIAM L. BEMIS and DOROTHY BEMIS, Joint Tenants,

Plaintiffs,

v.

CUDAHY COMPANY, a Delaware Corporation, and GENERAL HOST CORPORATION, a New York Corporation,

Defendants.

June 21, 1983

Deborah Carney and Hal Meltzer, Turner & Boisseau, Chartered, Great Bend, Kan., for plaintiffs.

Thomas Kitch and Ron Campbell, Fleeson, Gooing, Coulson & Kitch, Wichita, Kan., for defendants.

OPINION AND ORDER

THEIS, Senior District Judge.

This saltwater pollution case, which has been bogged down in an extraordinarily contentious discovery phase for nearly six years, is currently before the Court on the plaintiffs' motion for review of an order filed in this case by the United States Magistrate John B. Wooley, and on the defendants' motion for partial summary judgment. These two motions, fairly routine in other cases, have been pending for some time because of the avalanche of paperwork accompanying them. The corpulent documents pertinent to these motions comprise nearly four hundred and fifty pages, and are accompanied by three unpaginated bound volumes of appendices numbering over one hundred. Giving these documents, and the arguments made in them, the consideration to which they are due has been a time-consuming adventure for the Court, and has generated an Opinion substantially longer than the ideal. The task has nevertheless been completed, and, for the reasons that follow, the Court must deny both the plaintiffs' motion and the majority of the defendants' motion.

A. *Brief Factual Background*

The very numerous plaintiffs in the present lawsuit are owners and lessees of reality in Rice County, Kansas. To the northwest of this realty is the manufacturing plant of the American Salt Company [American Salt]. American Salt is a division of the defendant Cudahy Company [Cudahy], a Delaware corporaiton with its

principal place of business in Arizona. Cudahy is, in turn, a wholly-owned subsidiary of the defendant General Host Corporation, a New York corporation with its principal place of business in Connecticut. For convenience, the defendants will hereafter be collectively referred to as American Salt. American Salt is engaged in the business of producing salt and salt products, and this business has been carried on continuously at American Salt's present location since 1908.

The natural salt formation exploited by American Salt lies approximately 725 feet below the ground surface in a stratum 280 feet thick. Two methods are used to bring this salt to the surface. The first method utilizes a shaft mine and involves physically removing solid salt to the surface. The second method utilizes a matrix of brine wells and involves dissolving the salt in injected high pressure water, retrieving the saturated liquid brine at the surface, and evaporated the brine to leave solid salt. This latter method is called solution mining and is the only one pertinent to the issue in this lawsuit.

The water required by the solution mining process is obtained by American Salt from a natural aquifer that underlies the area at a depth of thirty to sixty feet. The aquifer flows in a southeasterly direction, and consequently passes under the lands owned or leased by the plaintiffs after it has passed under the lands occupied by American Salt and its solution mining field. As the existence of this lawsuit suggests, the aquifer has become heavily polluted with salt and can be used neither for irrigation nor for domestic purposes over a large area southeast of American Salt's plant. Salt concentrations approaching 30,000 parts per million [p.p.m.] have been recorded in water drawn from this aquifer. The gravity of these concentrations can best be appreciated when it is realized that concentrations as low as 250 p.p.m. are sufficient to make water taste salty and to render it unfit for domestic use. Saturated brine, that is, water holding

in solution the maximum amount of salt possible, has a salt concentration of approximately 165,000 p.p.m.

The contentions of the parties are outlined in the Pre-Trial Order, Dk. No. 309, which was filed on March 9, 1982 and supercedes the pleadings in the case pursuant to Rule 16 of the Federal Rules of Civil Procedure. The plaintiffs essentially lay the blame for the saltwater pollution of the aquifer on American Salt, allege "that the defendants' actions constitute a continuing nuisance, trespass, and damages," Pre-Trial Order at 4, and demand a variety of relief, including per-acre damages, an injunction, and punitive damages. American Salt denies all liability in a complex and many-faceted argument that will be explicated shortly.

B. *Motion To Review*

On May 19, 1982 the plaintiffs moved to supplement their pleadings pursuant to Rule 15(d) of the Federal Rules of Civil Procedure. In connection with this motion, the plaintiffs designated a new expert witness, Curtis Miller. On June 1, 1982, American Salt moved to strike Miller and two other expert witnesses from the plaintiffs' designation of experts. Magistrate Wooley, in a seven-page opinion filed October 20, 1982, construed the plaintiffs' motion as a motion to amend pursuant to Rule 15(a) and, as such, overruled it. The Magistrate also granted American Salt's motion to strike expert Miller, but overruled its motion to strike the other two experts. The plaintiffs have appealed the Magistrate's order to this Court, the eighth time that such an appeal has been perfected during the discovery in this case.

The plaintiffs sought to supplement their pleadings pursuant to Rule 15(d) with allegations that the salt dissolved in the aquifer is rising to the surface by capillary action and threatening to turn the entire area into a desert devoid of all plant life. Magistrate Wooley concluded "that if such capillary action exists at all, it has

been occurring for a long period of time prior to the filing of this motion," thus rendering Rule 15(d) inapplicable and transforming the motion into one for an amendment under Rule 15(a).

In determining whether justice required the amendment, Magistrate Wooley considered the feasibility of a separate suit on the capillary action theory, the motive of the plaintiffs in waiting until such a late date to assert the claim, and the glacial pace of the discovery completed up to that time. The Magistrate concluded that a separate suit was feasible, that there was a "distinct probability of improper motives on the part of the plaintiffs," that additional delay of up to two years in the trial of this matter could result, and that allowing the amendment would grant an "underserved tactical advantage to the plaintiffs" in regard to American Salt's motion for partial summary judgment that is dealt with in the next section of this Opinion. For these reasons, Magistrate Wooley overruled the motion. Finally, because the amendment was not permitted, American Salt's motion to strike expert Miller, whose testimony would have concerned only the capillary action theory, was granted.

It is well-established that the orders of a United States Magistrate must stand unless they are clearly erroneous or contrary to law, 28 U.S.C. § 636(b)(1)(A); *Devore & Sons, Inc. v. Aurora Pacific Cattle Co.*, 560 F. Supp. 236, 239 (D.Kan.1983). Although this Court would have approached these motions from a different conceptual basis had they been presented here in the first instance, the Court is unable to conclude that the *result* reached by the Magistrate is either clearly erroneously or contrary to law. The disputed order must, therefore, be sustained.

The short answer to the plaintiffs' motion to amend is that it is fatally defective in failing to allege any dam-

age resulting from the capillary action. Had the salt actually arrived on the surface and killed the vegetation, a far different case would be presented—and if the salt actually arrives on the surface at some future time, the Court has no doubt that a different case *will* be presented by the individuals damaged by such an arrival. At this point in time, however, justice simply does not require this Court to grant leave to the plaintiffs to amend their complaint in a way that alleges no damage and can lead to no recovery. When and if damage occurs, justice can be served by a separate lawsuit seeking recovery for that damage. Collateral estoppel and res judicata will not impede such a suit, as both Magistrate Wooley and this Court have concluded that the capillary action theory cannot be raised in this proceeding. The plaintiffs' motion to review the Magistrate's order is, therefore, overruled.

C. *Motion for Partial Summary Judgment*

1. *American Salt's Argument*

American Salt provides an analytical framework for its motion for partial summary judgment by dividing the plaintiffs into four distinct classes, as follows:

(a) Plaintiffs who "have sued for damages to property where there is no evidence of any significant pollution to the groundwater and, in some cases, where the groundwater does not even exist in sufficient quantity to support irrigation."

(b) Plaintiffs who "have sued for damages to property [that] admittedly lies outside the area of possible influences of the American Salt Company."

(c) Plaintiffs who "have sued for damages to property [that] they purchased with the knowledge or on the assumption that the groundwater was already polluted with chlorides.

(d) "All of those plaintiffs (or their predecessors in title) who do not fall into one or more of the three categories listed above knew or assumed or could have easily discovered that their groundwater was polluted with chlorides and believed that American Salt was responsible for such pollution more than two years before the date (May 31, 1977) this suit was filed."

Dk. No. 335, at 1. Because this analytical framework appears adequate to deal with the issues raised by American Salt's motion for partial summary judgment, it will generally be used as the organizational framework for this section of this Opinion as well.

2. *Preliminary Geography*

American Salt's manufacturing plant is located approximately one-half mile southeast of Lyons, Kansas and approximately four miles northwest of Saxman, Kansas. Two miles south of Lyons is Cow Creek, a minor tributary of the Arkansas River, which runs in a generally southeasterly direction. Cow Creek is located above the Cow Creek Valley Aquifer, which is the subject aquifer of this lawsuit and also runs in a southeasterly direction.

American Salt has provided the Court with two handsome multicolor maps, each approximately two by three feet in size and marked as exhibits A and 3, as well as numerous smaller geological maps incorporated into its so-called brief. Exhibit A shows the location of the lands owned or leased by each plaintiff, the boundaries of the Cow Creek Valley Aquifer, and the location of American Salt's properties, and is color coded to correspond to the four categories of plaintiffs established as American Salt's analytical framework. Exhibit 3 shows the extent, location, and severity of the salt pollution of the aquifer. The small illustration maps provide various other details. Reference to these maps has been extremely helpful

to the Court, but, as might be expected, their impact is somewhat lessened when the information they contain is translated into words.

An examination of these documents shows that the area of the Cow Creek Valley Aquifer that could possibly be affected by American Salt's operations is somewhat limited. The geological makeup of the area apparently causes Cow Creek to operate as a southern boundary for the spread of groundwater contamination emanating from the location of American Salt's plant. Another natural boundary line exists between one and a half to three miles northeast of Cow Creek, running southeast and essentially paralleling Cow Creek. This northern boundary separates the Cow Creek Valley Aquifer, which contains a large quantity of groundwater, from the Upland Loess Area, which contains a much smaller quantity of groundwater. The area described by these two boundaries is a corridor between one and two miles wide in which most of the plaintiffs' property and most of the saltwater pollution can be found.

3. *No Significant Pollution or Insufficient Groundwater*

This category comprises ten groups of plaintiffs whose properties are situated either partially to the north of the north boundary of the Cow Creek Valley Aquifer or partially or wholly to the south of Cow Creek. Some parts of these properties therefore lie outside the aquifer and the area of salt pollution. American Salt claims that "it is unnecessary to cite any authority in support of the proposition that plaintiffs who have suffered no measurable harm to their groundwater cannot recover damages in this action," Dk. No. 337 at 150. Although the Court is inclined to agree concerning those properties completely outside the aquifer, the argument is specious as applied to those properties that overlie the aquifer even slightly. *Any* access to the aquifer would allow a well

to be drilled, bringing the benefits of domestic and irrigation water to the whole tract, regardless of whether the entire tract overlies the aquifer.

Because American Salt has failed to carry its burden of proving beyond a reasonable doubt that it is entitled to summary judgment through a demonstration that no triable issue of material fact exists as to those properties partially overlying the aquifer, *Cayce v. Carter Oil Co.*, 618 F.2d 669, 672 (10th Cir. 1980); *Madison v. Deseret Livestock Co.*, 574 F.2d 1027 (10th Cir. 1978), its motion for partial summary judgment as to those tracts in category (a) and more precisely detailed on page 2 of Dk. No. 335 must be overruled except for the following tracts that are completely outside the boundaries of the aquifer:

Owner	Tract
Wilmer H. Oden	400 acres in Sections 1 & 2, Township 21 South, Range 8 West of the 6th Principal Meridian.
Edric Edwards	100 acres in Section 26, Township 20 South, Range 8 West of the 6th Principal Meridian.
Joleen Ottlinger	80 acres in Section 31, Township 20 South, Range 7 West of the 6th Principal Meridian.

Because the property described above belonging to Joleen Ottlinger is the only property belonging to that person involved in this lawsuit, complete summary judgment against Joleen Ottlinger must be entered.

4. *Outside the Influence of American Salt*

This category comprises seven groups of plaintiffs whose properties are located southeast of Saxman, Kansas. The contentions of the parties show no parallelism with regard to these tracts. American Salt appears to claim that an adjacent oil field "which has been in existence for many years and which would be a contributing (if not the original and exclusive) source of any

chlorides found in the groundwater in the area" makes proof of causation impossible, Dk. No. 337 at 151. The plaintiffs, on the other hand, appear to be arguing that the leading edge of the heavily polluted groundwater, which moves as the water in the aquifer flows southeasterly at the rate of approximately five feet per day, has not yet reached these properties but is certain to do so in the near future. The plaintiffs thus argue that these landowners "may reduce their future claims for permanent injury to a present claim for monetary damages," Dk. No. 351, Vol. 1, at 41.

Part of the difficulty with these properties is traceable to the unwillingness of the plaintiffs' expert witness to opine about the source of the salt pollution, if any, currently present in the aquifer in this locale. This unwillingness has resulted in a bizarre straight-line cut-off at the southeastern corner of Exhibit 3, which is the map showing the location and severity of the salt pollution of the aquifer. The Court is, therefore, left with no evidence tending even to suggest that pollution placed in the aquifer by American Salt has reached these properties. The situation is the same as that discussed in section B of this Opinion concerning the capillary action theory: this land may be damaged in the future, but apparently is undamaged now. Because the plaintiffs have failed to present any evidence of presently existing injury, American Salt is entitled to summary judgment as a matter of law because no triable issue of material fact exists, *Ando v. Great Western Sugar Co.*, 475 F.2d 531, 535 (10th Cir. 1973); *American Empire Ins. Co. v. Nugent*, No. 77-1466 (10th Cir., *unpub.*, Jan. 22, 1979), as to the following tracts:

Owner	Tract
Robert A. Johannsen	Southeast Quarter of Section 29, Township 20 South, Range 7 West of the 6th Principal Meridian.

Owner	Tract
Harry Zwick	West Half of Section 33, Township 20 South, Range 7 West of the 6th Principal Meridian.
Gary Zwick	Southeast Quarter of Section 32, Township 20 South, Range 7 West of the 6th Principal Meridian.
Harvey Willhaus	320 acres in Sections 4 & 5, Township 21 South, Range 7 West of the 6th Principal Meridian;
	100 acres in the Northwest Quarter of Section 28, Township 20 South, Range 7 West of the 6th Principal Meridian.
Lester Cole	180 acres in Section 4, Township 21 South, Range 7 West of the 6th Principal Meridian, and in Sections 33 & 34, Township 20 South, Range 7 West of the 6th Principal Meridian.
Wilmer Oden	Two lots in the Southeast Quarter of Section 2, Township 21 South, Range 7 West of the 6th Principal Meridian.
Jay Brothers	10 acres in the Northwest Quarter of the Southwest Quarter of Section 29, Township 20 South, Range 7 West of the 6th Principal Meridian; Lots in Saxman, Kansas.

Because all of the property invoved in this lawsuit belonging to Robert Johannsen, Gary Zwick, Harvey Willhaus, and Lester Colle is included in the preceding list, complete summary judgment against those individuals and in favor of American Salt must be entered. This entry of summary judgment is, of course, without prejudice to the right of these individuals to file new lawsuits unencumbered by the doctrines of res judicata and collateral estoppel when, if ever, the leading edge of the pollution in the aquifer crosses their property lines.

5. Property Purchased With Knowledge of Pollution

This category comprises six groups of plaintiffs whose properties are located deep within the area of the most severe salt pollution of the aquifer. American Salt relies

on two parallel arguments to assert its entitlement to partial summary judgment. First, American Salt argues that these plaintiffs purchased their land with the knowledge that the groundwater was polluted, that the plaintiffs therefore paid a dry land price for the properties, and that the plaintiffs therefore have not been injured by the pollution. Alternatively, American Salt cites the cases of *Roberts v. Pacific Northern Railroad Co.*, 158 U.S. 1, 15 S.Ct. 756, 39 L.Ed. 873 (1895) and *Taylor Investment Co. v. Kansas City Power & Light Co.*, 182 Kan. 511, 322 P.2d 817 (1958) for the proposition that these plaintiffs must suffer an adverse summary judgment because of ther failure, at this stage in the litigaton, to affirmatively prove that their grantors and predecessors in title specifically assigned a chose in action against Amercan Salt for the aquifer pollution in the deeds to the properties. Neither of these arguments is persuasive.

As for the transactions allegedly completed at a dry land price, the plaintiffs correctly point out that the polluted condition of the acquifer is hardly the only possible reason for the transactions to be made at that price. For example, a dry land price may have been paid because the state of irrigation technology extant at the time of the transaction was simply inadequate to take advantage of *any* water under the property, whether polluted or not, or because the topography of the particular parcel rendered it unsuitable for extant irrigation techniques. If the state of irrigation technology has now improved to the point where the salt pollution is the ony factor depressing the land values to dry land price, then these plaintiffs have suffered a compensable injury because of the pollution. This area of contention is, furthermore, rife with material factual disputes, such as the prices actually paid for the land, the prevailing dry land price at the time of the transactions, the exploitability of the groundwater resources at various times, and the knowledge and assumptions of the grantors and grantees.

The alternative case law argument founders on legal grounds. Even ignoring the easy distinguishability of *Roberts* and *Taylor*, which both dealt with open, visible, and notorious surface infringements on the right to quiet possession, American Salt has failed to carry its burden of proof because of its erroneous conception of where that burden lies. Although American Salt's statement that the "plaintiffs have the burden of establishing their right to sue by virtue of assignments of choses of actions in their deeds," Dk. No. 356 at 17, may be correct in the context of a *trial*, it is clearly erroneous in the context of a summary judgment motion. The burden is on American Salt to prove every element of its entitlement to summary judgment beyond a reasonable doubt, and all inferences must be indulged in favor of the plaintiffs who oppose the motion, *Madison, supra; Frey v. Frankel*, 361 F.2d 437, 442 (10th Cir.1966). Because American Salt has failed to carry this burden, its motion for partial summary judgment as to those plaintiffs in category (c) and their properties, as more precisely detailed on page 5 of Dk. No. 335, must be overruled.

6. Plaintiffs Barred by the Two-Year Statute of Limitations

This catch-all category comprises twelve groups of plaintiffs whose properties, like those in the preceding subsection, lie within the zone of the most acutely polluted groundwater. American Salt advances a tripartite argument to support its motion for partial summary judgment against this final category of plaintiffs: (a) the damage to the aquifer wrought by the immense quantity of salt dissolved in it is permanent damage; (b) the plaintiffs in this category knew of the permanent damage more than two years before this suit was filed; and (c) the plaintiffs are therefore barred by the two-year statute of limitations found in K.S.A. § 60-513. The Court has completed a very substantial amount of its own research on this subject to supplement the

arguments and analysis provided by the parties, and believes that each part of this tripartite argument deserves individual discussion.

a. Salt Damage to the Aquifer as Permanent Damage

A foray into the Kansas case law to determine the significance and validity of this assertion has revealed a rather muddled state of affairs. The Kansas Supreme Court itself, in the case of *McComb v. Stanolind Oil and Gas Co.*, 164 Kan. 1, 186 P.2d 574 (1947), has candidly admitted that "there seems to be some contrariety in the decisions" dealing with when a cause of action for damages to realty accrues, *id.* at 5. It appears to this Court that the contrariety is, in large part, due to the unprincipled and inconsistent use of the terms "temporary" and "permanent" in these cases.

As a preliminary matter, it should be noted that, when realty is damaged by pollution, the terms "temporary" and "permanent" can be applied to three quite distinct facets of the situation. First, the *pollution itself*, or the causal chemistry of the injury to the land, may be either temporary or permanent. Second, the *damage or loss* caused by the injury may be temporary or permanent. Last, the *source or origin of the pollution*, be it a sewage plant, an oil well, or a salt mine, may be temporary or permanent. The possibilities for inconsistencies are, of course, multiplied when different labels are applied to these facets, such as, for example, calling the source of the pollution a nuisance and then characterizing the nuisance as temporary or permanent. Some of the Kansas cases focus on one of these facets, and some focus on another. In those cases where an explicit "temporary" or "permanent" distinction is drawn, it is determinative of when the cause of action accrued and, consequently, of when the cause of action became barred by the applicable statute of limitations. Because of the wide diver-

sity displayed by these cases, a chronological survey of them is, unfortunately, a necessity, and so such a chronology follows.

1. Cases Prior to 1930

In the venerable case of *Kansas Pacific Railway v. Mihlman*, 17 Kan. 224 (1876), the Railroad trespassed on Mihlman's land and constructed a culvert and ditch, partially encroaching on Mihlman's land, that caused flood damage more than two years later. The Kansas Supreme Court concluded that the unlawful nature of the original trespass, actionable in itself, caused the statute of limitations to start running at the time of the trespass, and found Mihlman's suit barred. The Court, in an effort to highlight by contrast, went on to hold that

> where one creates a nuisance, and permits it to remain, so long as it remains it is treated as a continuing wrong, and giving rise, over and over again, to causes of action. But the principle upon which one is charged as a continuing wrongdoer is, that he has a legal right, and is under a legal duty, to terminate the cause of the injury.

Id. at 231.

In *McDaniel v. City of Cherrydale*, 91 Kan. 40, 136 P. 899 (1913), the first explicit decision of a temporary/permanent questions found. The City of Cherryvale constructed a sewer system in 1905 that discharged into Drum Creek, a small stream that ran through McDaniel's property. An oil refinery constructed in 1905 also discharged into the creek. Plentiful rains diluted the sewage and prevented McDaniel from noticing any problem. In 1909, a dry spell concentrated the sewage to such an extent that the water was rendered unfit for any purpose. The Kansas Supreme Court held that

> as the sewer system constructed by the city and the refinery constructed by the oil company were

> *permanent in their nature* and as the flow of the sewage and refuse from them was designed to continue indefinitely in the future a cause of action for *permanent damages* arose when the sewage and other impurities were first emptied into the stream.

Id. at 43, 136 P. 899 (emphasis added). The Court refined its perception of the sewer system and refinery as "permanent in their nature" by holding that

> the sewer system and refinery are, in their nature, design, and use permanent structures, *the operation of which will necessarily be injuries to plaintiff's land and must continue permanently to affect and depreciate the value of his land.*

Id. at 46, 136 P. 899 (emphasis added). Because the first dumping had occurred more than two years before McDaniel's suit was filed, he was barred.

2. 1930s Cases

Six cases of particular significance were decided in the 1930s, when the production of Kansas petroleum increased substantially. In *Lackey v. Prairie Oil & Gas Co.*, 132 Kan. 754, 297 P. 679 (1931), the single oil well drilled by the defendant in 1925 had been joined by eleven to thirteen new ones whose combined output of waste and refuse injured Lackey's pasture. The Kansas Supreme Court noted that

> the oil wells were *permanent structures, designed to continue indefinitely.* The conditions under which they were operated were such that the injury was constant as well as progressive.

Id. at 757, 297 P. 679 (emphasis added), and that

> in this instance the bringing in of the first oil well in 1925 caused injury to plaintiff's land, and the

> *permanent nature of the injury* was demonstrated more than two years before he sued for damages.

Id. at 758, 297 P. 679 (emphasis added). Lackey's suit was, therefore, held to be barred.

In *Berry v. Shell Petroleum Co.*, 140 Kan. 94, 33 P.2d 953 (1934), the question of whether salt pollution of underground water is temporary or permanent injury was argued to the Kansas Supreme Court. At trial, the plaintiff claimed and recovered permanent damages. The jury also expressly found that the groundwater, like the aquifer in this case, had a definite direction of flow. This finding was leapt on by the pollution oil company, which argued that the damage to the plaintiff's groundwater could only be temporary because the natural flow would eventually carry the pollutants away, and that the award of permanent damages should, therefore, be reversed. The Court held that

> this Court is not prepared to say that when the substrata has once become saturated with salt from an oil well the water moving through it will cleanse it so that the water in the well will become pure again. The evidence on this point is too vague. We doubt if anyone knows. We think the instructions correctly state the law.

Id. at 105, 33 P. 953. Despite the contentions of the parties and the obvious precedential weakness of this statement, American Salt has nevertheless cited it as binding authority for the proposition that salt pollution of an aquifer is a permanent injury, Dk. No. 337 at 155.

The next year, contrariety apepared in the case of *Gardenhire v. Sinclair-Prairie Oil Co.*, 141 Kan. 865, 44 P.2d 280 (1935). The facts were somewhat similar to those in *Lackey*; 1926 oil wells that had previously caused some pollution were deepened in 1931 and thereafter caused substantially more pollution. Instead of focusing on the permanent nature of the oil wells them-

selves, however, the Kansas Supreme Court appears to have focused on the nature of the injury caused by them:

> the defendants had no right to pollute a stream or natural watercourse by prescription. Timber Creek and the ravine leading into it were natural watercourses. The pollution of the stream was wrongful and therefore no permanent right can be acquired. "The pollution of the stream being a wrongful act, no permanent right to continue it can be acquired; and, therefore, the damages to be awarded must be merely for the temporary injuries which have occurred to the time of trial or to the time of bringing the action if, under the local practice, that is the time fixed for the computation of damages to be recovered in the action."

Id. at 870, 44 P.2d 280 (citations omitted). The Court went onto examine an instruction given by the trial court to the effect that *any* injury occurring more than two years prior to the filing of the suit and traceable to the pollution would cause the suit to be barred. The Court opined that "the given instruction was more favorable to the defendants than the law warrants," *id.* at 871, 44 P.2d 280.

The next year, in *Fulmer v. Skelly Oil Co.*, 143 Kan. 55, 53 P.2d 825 (1936), the Kansas Supreme Court explicitly recognized that

> there is a confusion involved in the discussion of the law of the case as to the damages being permanent or temporary, and also as to the liability for damages for pollution being dated from the permanent structure of the plants, which by common knowledge may be positively expected to cause pollution and damage, or from the date of the first serious injury from pollution.

Id. at 56, 53 P.2d 825. The Court labeled the injury as permanent because the plaintiff had asked only for perma-

nent damages, *id.* at 57, 53 P.2d 825, performed a survey of prior cases to determine when the permanent damage began, *id.* at 59-61, 53 P.2d 825, and held that the plaintiff's cause of action accrued when the stream was first polluted in 1917, and not when a drought caused the pollution to become so concentrated for the first time as to prevent the plaintiff's cattle from drinking it and thereby substantially injure the plaintiff.

An entirely new field of potential confusion was introduced by *Jeakins v. City of ElDorado*, 143 Kan. 206, 53 P.2d 798 (1936). As in *McDaniel, supra*, the plaintiffs in *Jeakins* were injured by the operation of a municipal sewer system. Two distinct claims were made: one for a decrease in the value of plaintiff's land and a second for psychological and health injuries to the plaintiffs. The Court construed the first of these claims to be one for permanent damages, and the second to be one for temporary damages, *id.* at 210, 53 P.2d 798. *McDaniel* was then cited for the proposition that the sewer system, as a permanent structure whose "operation was necessarily a constant and continuous use," created a cause of action for permanent damages when the sewage was first placed in the stream, *Jeakins*, 143 Kan. at 210, 53 P.2d 798. Although this holding barred the claim of permanent damages, the Court nevertheless allowed the plaintiffs to proceed on their claim for temporary damages, apparently because the negligent operation of the sewer system by the city made that system a *nuisance.*

This new distinction was picked up by *Seglem v. Skelly Oil Co.*, 145 Kan. 216, 65 P.2d 553 (1937), where the Kansas Supreme Court, in a holding very similar to that in *Fulmer*, took special care to point out "that this was an action for permanent damages to the farm, not for recurring damages, *nor for the abatement of a recurring or continuing nuisance*," *Seglem*, 145 Kan. at 221, 65 P.2d 553 (emphasis added). No attempt is made, however, to explain why the negligent operation of a sewer

system leading to pollution creates a continuing nuisance, while the negligent operation of an oil field leading to pollution does not.

3. 1940s Cases

Four cases of significance to the present inquiry were handed down by the Kansas Supreme Court in the 1940s. The first, *Donley v. Amerada Petroleum Corp.*, 152 Kan. 518, 106 P.2d 652 (1940), involved the now-familiar pollution of the surface waters by an oil company. With nary a word written about the nature of the oil wells as permanent structures, the Court affirmed a judgment in favor of the plaintiffs, including both actual and punitive damages, based on a theory of temporary damage to a stock farm. The plaintiffs apparently made a simple election to sue for temporary instead of permanent damages, phrased their measure of recovery in the decreased rental value of the farm after the pollution, and sought that level of recovery for the two years preceding their filing of suit. The Court voiced no quarrel with this procedure.

The next year, in *Eyman v. National Union Oil & Gas Co.*, 153 Kan. 45, 109 P.2d 477 (1941), the Kansas Supreme Court demonstrated an unwillingness to perform a *Donley*-type analysis when *all* of the items of claimed damage had occured more than two years before suit had been brought. The petition alleged permanent damages to the premises, incuding the destruction of trees, but made clear that all of these damages were complete more than two years before. The plaintiff's argument that the oil wells constituted an abatable nuisance did not carry the day, but the Court simply ignored the nuisance component of the argument and focused on the permanent nature of the damage already done, *Eyman*, 153 Kan. at 47-48, 109 P.2d 477.

Peterson v. Texas Co., 163 Kan. 671, 186 P.2d 259 (1947), is yet another case of saltwater pollution from

an oil field causing damage to an adjacent farming operation. Instead of the more usual surface pollution, however, this case dealt with salt pollution of the freshwater strata beneath the plaintiff's farm. The plaintiff phrased his petition in terms of temporary damages, even though the temporary nature of the death of heifers, chickens, and large tracts of prairie grass is open to some dispute, and elected to sue to recover these temporary damages on a bi-annual basis. The reported case is, in fact, the second one brought by the plaintiff against the oil company. The Court stated that

> there can be no doubt but that plaintiff did have knowledge as early as 1941 that oil-field refuse from defendant's wells was flowing onto his farm in substantial amount,

id. at 677-78, 186 P.2d 259, but then went on to distinguish *McDaniel*, *Lackey*, *Fulmer*, and *Eyman* solely on the basis that those cases were for permanent damages. The judgment below in favor of the plaintiff was affirmed.

4. Cases After 1950

As previously mentioned, it was the 1947 *McComb* case that first took explicit notice of the contrariety in the Kansas cases. Cases after 1950 concerning the time of accrual of a cause of action and the temporary/permanent question take frequent notice of the conflict. *See, e.g.*, *Henderson v. Talbott*, 175 Kan. 615, 266 P.2d 273 (1954) ("The question when a cause of action for damages because of overflow of land accrues is one beset with difficulties, on which the authorities are in great conflict and exhibit considerable confusion. This is true even in our own jurisdiction where it must be admitted there is some contrariety in our own decisions," *id.* at 620, 266 P.2d 273); *Gowing v. McCandless*, 219 Kan. 140, 547 P.2d 338 (1976) ("The [statute of limitations question] involved on this appeal is one normaly encountered where

damages occur when water overflows agricultural land. On this general subject our decisions are conflicting," *id.* at 143-44, 547 P.2d 338); *Dougan v. Rossville Drainage District*, 2 Kan.App.2d 125, 575 P.2d 1316 (1978) ("The question of when a cause of action accrues as a result of a party causing another's land to be flooded has been extensively litigated in Kansas. Not all of the Kansas authority is in harmony," *id.* at 127, 575 P.2d 1316). As the quotations indicate, these cases deal with the flooding of one person's land because of another person's acts. The legal analysis as to the time of accrual of the cause of action, the significance of the temporary/permanent distinction, and the explication of nuisance doctrine performed by these recent cases, however, is fully applicable and very helpful to the present inquiry.

In *Henderson*, the defendant, had constructed a dam on his property that backed up water on the plaintiff's property. The trial court ruled that the plaintiff could recover for all injuries accruing within two years of the filing of the suit, and the jury returned a verdict favorable to the plaintiff. The Kansas Supreme Court quoted the following passage from 56 Am.Jur. *Waters*, §§ 45, 443 (now 78 Am.Jur.2d *Waters*, §§ 35, 39, 122, 123, 128, and 367):

> In actions by riparian owners for damages for interference with the flow of a stream, the scope of recovery is usually held to depend on whether the injury is permanent or continuing. The weight of authority is to the effect that whenever the structure or obstruction impeding the flow of water is of a permanent character, and its construction and continuance are necessarily an injury, the damage is considered original, to be recovered in one action, and not continuous in character, and the statute of limitations begins to run from the completion of the obstruction, or at least from the time of the first injury. But when the construction and continuance

> of the structure are not necessarily injurious, but may or may not be so, the injury to be compensated in a suit is only the damage which has happened; and there may be as many successive recoveries as there are successive injuries. In such cases the statute of limitations begins to run from the happening of the injury complained of.
>
> . . . .
>
> The determination of the question whether the flooding of land gives rise to a single right or successive rights of action depends ordinarily upon whether the injury or the causative condition is permanent or temporary. The rule prevailing in most jurisdictions is that if the injury is permanent, or if the causative structure or condition is of such a character that injury will inevitaby result and the amount of damage can be determined or estimated, a single action may and should be brought for the entire damage, both past and prospective. But if the overflow is merely temporary, occasional, or recurrent, causing no permanent injury to the land, causing no permanent injury to the land, or if the situation involves other elements of uncertainty, such as the possibility or likelihood of the alteration or abatement of the causative conditions, or uncertainty in regard to the future use or improvement of the land, so as to prevent a reasonably accurate estimate of future damages, it is generally held that each reptition (repetition) of the overflow gives rise to a new cause of action for which successive actions may be brought.

Henderson, 175 Kan. at 621, 266 P.2d 273. This langauge was then supplemented by the quotation from the *Mihlman* case concerning nuisance and previously set about above, *supra* p. 900, and a quotation from *McDaniel* indicating that the plaintiffs in that case "*could have elected* to have sued for temporary damages sustained within the statutory period preceding the bringing

of the action," *Henderson*, 175 Kan. at 623, 266 P.2d 273 (quoting *McDaniel*, 91 Kan. at 43, 136 P. 899) (emphasis added). This authority was sufficient to cause the Court to affirm the plaintiff's judgment. Of particular significance to the present inquiry is the following language, found at the end of the statute of limitation discussion:

> In reaching the conclusion just announced we have not attempted to distinguish and are not disposed to labor the divers cases cited by appellant in support of his position. It suffices to say that some of them can be distinguished because the structure involved was located on the land of the person seeking to recover damages; some are distinguishable because the action was to recover for permanent injuries to the real estate in question; others are not comparable for the reason, that exactly contrary to the situation in the case at bar, the nuisance created by the structure in question was not abatable and the injuries resulting therefrom were continuous and permanent; and still others are not in point because of wholly dissimilar factual situations. And it should be added that *if there is language in any of such decisions indicating views contrary to those herein expressed under prevailing conditions and cirumstances it is no longer entitled to weight and should be disregarded.*

Henderson, 175 Kan. at 624, 266 P.2d 273 (emphasis added).

The notion that plaintiffs enjoy an election as to whether to pursue temporary or permanent damages was reinforced in the case of *Augustine v. Hinnen*, 201 Kan. 710, 443 P.2d 354 (1968). The plaintiffs there sought actual and puntive damages for saltwater pollution of their fresh water wells by the defendant oil leasehold owners and operators. The pollution had begun nine

years before the suit was filed at the earliest, and five years before at the latest. In its recital of the facts, the Kansas Supreme Court stated that "at the pretrial hearing plaintiffs elected to pursue their case on the theory of temporary damages for the two-year period beginning in the fall of 1962," *id.* at 711, 443 P.2d 354. Although the opinion leaves something to be desired in terms of clarity, it appears that the jury found that the defendants had allowed the escape of deleterious substances within two years of the filing of the suit and that the jury awarded actual and punitive damages. The verdict for actual damages was affirmed.

In *Gowing v. McCandless*, 219 Kan. 140, 547 P.2d 338 (1976), upper landowners sought actual and punitive damages from a lower landowner whose obstruction of a watercourse seven years before suit was filed had caused damage to the plaintiffs' crops in later years by backing up water over the plaintiffs' fields. The Kansas Supreme Court noted that the plaintiffs had elected to seek temporary damages and then focused on the nature of the *obstruction*:

> In the instant case the evidence does not show the cause of the injury to be permanent. In many cases injuries have been classified as temporary or recurring in nature when caused by an abatable nuisance or condition, or by defects which can be repaired or remedied at reasonable expense. Successive injuries of this nature have been held to give rise to separate and distinct causes of action.

Id. at 145, 547 P.2d 383. The judgment for the plaintiff was affirmed.

This general trend was followed in the recent case of *Bowen v. City of Kansas City*, 231 Kan. 450, 646 P.2d 484 (1982), where the plaintiffs sought to recover damages for flooding resulting from the defendant's creation

and maintenance of a nuisance. The Kansas Supreme Court stated that

> Plaintiffs rely upon our decisions which state that where there is a nuisance which is a temporary condition that is abatable, a new cause of action arises each time damage occurs. This is undoubtedly the law insofar as a person who *maintains* an abatable nuisance is concerned. This court has considered numerous cases where periodic flooding resulted from the acts of another and we have held that the statute of limitations begins to run at the time each loss resulting from the maintenance of the nuisance occurs and not from the time the nuisance was first created. *Gowing* . . . . However, the rule of *Gowing* and its predecessors is predicated upon the defendant's ability and duty to abate the existing conditions which constitute the nuisance.

Bowen, 231 Kan. at 454, 646 P.2d 484 (emphasis in original).

The final case to be considered in this section of this Opinion is *McAlister v. Atlantic Richfield Co.*, 233 Kan. 252, 662 P.2d 1203 (1983), in which the plaintiff was seeking the recovery of damages caused by alleged violations of the Oil Well Pollution Act, K.S.A. § 55-121. The plaintiff filed case number 54,357 some seven years after his well water became undrinkable, naming as defendants two oil companies that had last conducted operations in the area in the 1930s and 1940s. The plaintiff also alleged "that not less than 150 nor more than 400 years will pass before the well water will be once again fit for drinking," 662 P.2d at 1212. Justice Lockett held the claim to be barred by the two-year statute of limitations after making the following statements on the temporary/permanent question:

> Temporary damages or continuing damages limit recovery for injury that is intermittent and occasional

> and the cause of the damages remedial, removable, or abtable. Damages are awarded on the theory that [the] cause of the injury may and will be terminated. Temporary damages are defined as damages to real estate which are recoverable from time to time as they occur from injury. 25 C.J.S. *Damages*, § 2, p. 626. Permanent damages are given on the theory that the cause of injury is fixed and that the property will always remain subject to that injury. Permanent damages are damages for the entire injury done—past, present, and prospective—and generally speaking those which are practically irremediable. 25 C.J.S. *Damages*, § 2, pp. 622-23. If an injury is permanent in character, all the damages cause thereby, whether past, present, or prospective, must be recovered in a single action.

662 P.2d at 1211.

5. Proper Doctrinal Course For This Case

The proper approach to sorting out the preceding precedents and setting a course for this litigation to follow was suggested by the Kansas Supreme Court in *Gowing*. In a decision that has come to appear increasingly wise to this Court, that Court summarily decided that

> No attempt will be made in this opinion to venture into the thicket of Kansas cases beginning from statehood. Our recent cases establish a trend in the law which controls our decision herein.

Gowing, 219 Kan. at 144, P.2d 338. The first principle that will be relied on, therefore, is that the recent trends in Kansas law should be given relatively greater regard than the trends expressed in the cases that are now between fifty and one hundred years old.

A second bit of guidance comes from the oft-repeated assertion of the Kansas courts that

> it is to be borne in mind that each [prior] decision has been rendered upon the particular facts of that case, and when that is borne in mind some of the difficulty disappears.

McComb, 164 Kan. at 5-6, 186 P.2d 574. *See also Dougan*, 2 Kan.App.2d at 127, 575 P.2d 1316 ("Obviously, each case must be decided on its own facts, giving due regard to established law."). The second principle, therefore, is that those elements of this case that present a case of first impression in this jurisdiction and that serve to distinguish this case from the cases discussed above—such as the pollution originating from a solution salt mining operation, the egregiousness of the pollution in this case, the large area and number of people affected, and the continuous nature of the enterprise (and perhaps the pollution itself) over such a protracted period—are entitled to full weight and consideration.

The third principle is that the dynamic and evolving nature of tort law must be accorded its proper significance. In 1931, the Kansas Supreme Court, in the *Lackey* opinion, discounted a prior case with the statement that "the opinion was written nearly fifty years ago, and the writer of the opinion did not have the benefit of the searching analysis of tort liability which has been made in recent years," *Lackey*, 132 Kan. at 758, 297 P. 679. Of course, the same criticism can now be made of *Lackey* itself, which is presently fifty-two years of age.

A fourth principle can be derived from the indeterminate overruling of prior inconsistent cases accomplished in 1954 in the *Henderson* opinion. Although the scope of this overruling and the exact cases affected are uncertain to some degree, the existence of such language in the opinion is sufficient to case doubt on the validity of some of the harsher cases that preceded *Henderson*.

With these four principles firmly in mind, an examination of the cases surveyed in the preceding subsec-

tion of this Opinion convinces this Court that the Kansas Supreme Court, if presented with American Salt's statute of limitations argument, would find that argument unpersuasive. The recent trend in the Kansas case, traceable to *Mihlman*, *Gardenhire*, and *Jeakins* and most recently affirmed in *Gowing* and *Bowen* is to consider the damage resulting from an abatable nuisance that causes pollution to be temporary damage, giving rise over and over again to causes of action to recover for the injuries sustained in the statutory period immediately preceding the filing of the suit, at least so long as some acts of pollution continue. Several auxiliary points strongly support this conclusion.

First among these auxiliary points is the dispute between the plaintiffs and American Salt as to whether pollution is continuing. American Salt, as might be expected, asserts that its plant has caused no significant pollution since 1965, *see, e.g.*, Dk. No. 356 at 73, No. 2. If one indulges the assumption that the salt now polluting the aquifer originally escaped from American Salt's control, and further indulges the assumption that American Salt's statement that no pollution is now occurring is true, then American Salt has, in essence, admitted to abating a polluting nuisance. Certainly American Salt would be hard-pressed to argue that its plan is a "permanent structure, the operation of which will necessarily be injurious to plaintiffs' land," *McDaniel*, 91 Kan. at 46, 136 P. 899, inasmuch as such an argument would be tantamount to an admission that the plan is still polluting, and uncontrollably so at that. The salt plant is not designed to pollute the aquifer, and should not do so in the absence of negligence. If the plant does pollute the aquifer, it does so because of "defects which may be repaired or remedied," *Gowing*, 219 Kan. at 145, 547 P.2d 338. The polluting plant would, therefore, constitute an abatable nuisance that would support an endless series of separate and independent actions, at least until all

pollution was halted and the nuisance thereby abated, *id.* Because the cause of the injury—the loss of salt into the aquifer—is not fixed, an award of temporary damages "on the theory that [the] cause of the injury may and will be terminated," *McAlister*, 662 P.2d at 1211, is clearly appropriate.

The second auxiliary point is closely related to the first, and centers on an apparently admitted occurrence of aquifer pollution in 1979. The plaintiffs have alleged that one of the old brine wells was discovered to be communicating with both the aquifer and the high-pressure solution mining field in November of 1979, but that the shutdown of the solution mining field required to repair this defect was not undertaken until the losses of brine from the solution mining operation became so acute as to interfere with the desired production levels at the plant. *See* Dk. No. 351, Vol. 1 at 27-28; Vol. 2, App. 3 at 53-56. American Salt has cavalierly responded to this serious charge with the statement that the paragraph "is the *only* paragraph in the plaintiffs' *entire* summary which contains *any* evidence that *one* of the brine wells *may* have caused *some* pollution for a short period of time," Dk. No. 356 at 62 (emphasis in original). The reason for such aloofness should be apparent. Were American Salt's statute of limitations argument accepted by this Court, American Salt would be absolutely immune from *any* damage claim by *any* of the present plaintiffs in perpetuity, even if those claims were based on recent or future wrongful acts of pollution that were part of a pattern of continuing or escalating pollution. Accepting the statute of limitations argument would be the functional equivalent of granting American Salt a license to pollute as appears profitable or expedient to American Salt at any particular time, a result clearly in conflict with the previously quoted language from the *Gardenhire* case to the effect that "the pollution . . . being a wrongful act, no permanent right to continue it can be acquired," *Gardenhire*, 41 Kan. at 870, 44 P.2d

280. Of course, these anserous results of American Salt's argument are nowhere mentioned in its documents. This Court's conscience would be shocked by the insulation of a continuing wrongdoer from liability for his wrongful acts.

The third auxiliary point involves the rapid change in attitudes towards pollution of the natural environment witnessed in the last two decades. Justice Smith's observation that "the water supply of the people is of greater importance than the operation of a business at reduced costs," *Berry*, 140 Kan. at 102, 33 P.2d 953, has been vindicated by state statutes that prohibit the pollution of surface and subsurface waters by, among others, operators of salt water injection wells, K.S.A. § 65-171d, and that expressly declare each day of polluting activity to be separate offense, K.S.A. § 65-171f. The Kansas Legislature has expressed a clear intention to heavily discourage the pollution of the state's water resources, and this Court is loath to thwart this goal with broad and ill-defined grants of immunity to continuing polluters for both past and future acts of pollution.

Last, it should not be forgotten what the plaintiffs have pleaded. Rather than claiming permanent damages for permanent injuries resulting from a permanent structure constituting a permanent nuisance, the plaintiffs have alleged "a continuing nuisance, trespass, and damages," Pre-Trial Order, Dk. No. 309, at 4. This Court can only construe such language as reflecting an election by the present plaintiffs to pursue the remedy of temporary damages.

The Court has, on its own initiative, done some cursory research on the question of how these temporary damages should be measured. Even a brief examination of the Kansas cases on this issue shows them to be suffering from the imprecise and unpredictable use of "temporary" and "permanent," *see, e.g., Adam v. City of Arkansas*

City, 188 Kan. 391, 362 P.2d 829 (1961); *Alexander v. City of Arkansas City*, 193 Kan.. 575, 396 P.2d 311 (1964). This already overburdened opinion cannot support an analysis of this question: the issue shall be saved for another day.

It may be remembered by the now-fatigued reader that this subsection deals with the first part of American Salt's tripartite argument in support of its statute of limitations argument, namely, whether salt pollution of the aquifer is permanent damage. *See supra* p. 14. The preceding discussion and analysis compels this Court to conclude that the plaintiffs' allegations are suffiicent to categorize the American Salt operation as a continuing nuisance if it is responsible for the pollution now present in the aquifer; that the nuisance represented by the operation is abatable because the defects, if any, causing pollution may be repaired or remedied; and that the injury suffered by the plaintiffs because of American Salt's continuing pollution, if any, is temporary in nature. *See generally City of Tarrisonville v. Dickey Clay Mfg. Co.*, 289 U.S. 334, 340-41, 53 S.Ct. 602, 604-05, 77 L.Ed. 1208 (1933); *Hilton v. Duke Power Co.*, 254 F.2d 118, 122 (4th Cir.1958); *Conestee Mills v. City of Greenville*, 160 S.C. 10, 158 S.E. 113 (1931).

b. Notice of Damage More Than Two Years Ago

Although the holding in the previous subsection tends to make American Salt's argument concerning notice irrelevant, the section of Amerian Salt's brief devoted to this argument is so remarkable that it nevertheless deserves some comment. American Salt prefaces the argument with the statement that

> for the purposes of this Memorandum and the Motion [that] it supports, it is asumed that the American Salt Company caused the pollution [that] now exists in all the groundwater "downstream" from the plant —the entire area [that] could have possibly been influenced by the activities of the company since its

> inception in approximately 1908. Thus, the issue of causation is not addressed herein.

Dk. No. 337, at 1-2. American Salt then follows this disclaimer with a detailed recital, comprising nearly one hundred and fifty pages, of the convincing evidence that American Salt's operations are directly responsible for the salt presently dissolved in the aquifer. This recital covers the entire period of the facility's existence and is exceptionally detailed for the period since 1933.

In order to support the argument that the present plaintiffs knew of the salt pollution damage to the aquifer more than two years before this suit was filed, American Salt was compelled to demonstrate both that the level of pollution was severe and that American Salt was discoverable as the cause of the pollution. The documentary and deposition evidence assembled by American Salt on these points is, to say the least, very persuasive, and should serve to save time at the trial of this matter.

Additionally, this Court notes that the impressive quantity of evidence dredged up by American Salt tends, by its very completeness, to remove this case from the class of cases that statutes of limitations were originally designed to control. The conceptual basis for statutes of limitations has often been explained. The United States Supreme Court has written that statutes of limitations

> are designed to promote justice by preventing surprises through the revival of claims that have been allowed to slumber until evidence has been lost, memories have faded, and witnesses have disappeared.

Order of Railroad Telegraphers v. Railway Express Ageny, Inc., 321 U.S. 342, 348-49, 64 S.Ct. 582, 586, 88 L.Ed. 788 (1944). Likewise, the Rhode Island Supreme Court has written that

> statutes of limitations were intended to prevent the unexpected enforcement of stale claims concerning which persons have been thrown off their guard for

> want of seasonable prosecution . . . . They afford parties needed protection against the necessity of defending claims [that], because of their antiquity, would place the defendant at a grave disadvantage. In such cases how resolutely unfair it would be to award one who has willfully or carelessly slept on his legal rights an opportunity to enforce an unfresh claim against a party who is left to shield himself from liability with nothing more than tattered or faded memories, misplaced or discarded records, and missing or deceased witnesses.

Wilkinson v. Harrington, 104 R.I. 224, 243 A.2d 745 (1968). Although this Court would never ignore a clear statute of limitation bar solely because the defendant appeared ready and able to defend himself, the existence of clear memories, cited records, and deposed witnesses is certainly a factor to weigh in the balance in a case such as this.

c. The Plaintiffs Are Barred by K.S.A. § 60-513

K.S.A. § 60-513 provides, in pertinent part, that

> (a) The following actions shall be brought within two years:
>
> . . . .
>
> (4) an action for injury to the rights of another, not arising on contract, and not herein enumerated.
>
> (b) . . . the cause of action in this action [section] shall not be deemed to have accrued until the act giving rise to the cause of action first causes substantial injury . . . .

Because this Court has concluded that the plaintiffs' allegations in this case entitle them to attempt to show at trial that the American Salt facility constitutes an abatable nuisance causing temporary damages through salt pollution of the aquifer, the assertion that K.S.A. § 60-

513 bars the plaintiffs' claims in their entirety is without merit. This does not mean, however, that the section is irrelevant to this case. K.S.A. § 60-513 does operate to preclude the plaintiffs from recovering for injuries sustained more than two years prior to May 31, 1977, the day this suit was filed. American Salt's motion for partial summary judgment must therefore be overruled in all particulars not expressly granted above, and the plaintiffs are entitled to attempt to prove and recover their damages that have accrued between May 31, 1975 and the date of judgment in this case.

IT IS THEREFORE ORDERED that the plaintiffs' motion for review of the Magistrate's motion for review of the Magistrate's order filed October 20, 1982 is overruled.

IT IS FURTHER ORDERED that the defendants' motion for partial summary judgment is sustained as to plaintiffs Joleen Ottlinger, Robert Johannsen, Gary Zwick, Harvey Willhaus, and Lester Colle.

IT IS FURTHER ORDERED that the defendants' motion for partial summary judgment is sustained as to the individual parcels of land listed below:

Owner	Tract
Wilmer H. Oden	400 acres in Sections 1 & 2, Township 21 South, Range 8 West of the 6th Principal Meridian; 2 lots in the Southeast Quarter of Section 2, Township 21 South, Range 7 West of the 6th Principal Meridian.
Edris Edwards	160 acres in Section 26, Township 20 South, Range 8 West of the 6th Principal Meridian.
Harry Zwick	West Half of Section 33, Township 20 South, Range 7 West of the 6th Principal Meridian.
Jay Brothers	10 acres in the Northwest Quarter of the Southwest Quarter of Section 29, Township 20 South, Range 7 West of the 6th Principal Meridian; Lots in Saxman, Kansas.

IT IS FURTHER ORDERED that the defendants' motion for partial summary judgment is denied in all respects not sustained above.

IT IS FURTHER ORDERED that the Clerk of this Court notify the parties to this lawsuit that, as one of the Court's oldest cases, it will be set down on the trial docket at the earliest possible date after August 1, 1983 that the availability of courtroom facilities and the Court's commitments make feasible.

APPENDIX F

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

November 1, 1988

Before the Honorable William J. Holloway, Jr., Chief Judge, Honorable Monroe G. McKay, Honorable James K. Logan, Honorable Stephanie K. Seymour, Honorable John P. Moore, Honorable Stephen H. Anderson, Honorable Deanell R. Tacha, Honorable Bobby R. Baldock, Honorable Wade Brorby and Honorable David M. Ebel, Circuit Judges.

Nos. 87-1502
87-2283

CECIL W. MILLER and MILDRED E. MILLER, Joint Tenants; MARGARET L. BIRCHENOUGH TESTAMENTARY TRUST, DONALD L. BIRCHENOUGH, ANSEL TOBIAS and WALTER WRIGHT, Trustees; RUTH M. HOLLINGER, Individually and as Joint Tenant with DELBERT HOLLINGER; JOHN E. EDWARDS and KERMIT C. EDWARDS, Joint Tenants; HOMER SHARPE; CECIL M. TOBIAS and FRANCES TOBIAS, Joint Tenants; PAUL F. WESTRUP and ARDIS B. WESTRUP, Joint Tenants; JAY BROTHERS; LYLE BROTHERS, Individually and as Joint Tenant with PATRICIA R. BROTHERS; ALVIN ENGELLAND; ANSEL ENGELLAND; JACK ENGELLAND and VIVIAN M. ENGELLAND, Joint Tenants; GERALD N. JONES and DONNA JONES, Joint Tenants; ROBERT A. JOHANNSEN; RAYMOND E. TOBIAS; GARY ZWICK; LESTER COLLE; HARVEY WILLHAUS and MARILYLN WILLHAUS, Joint Tenants; WILMOR H. ODEN; RAPHAEL ROEDER and ANNABELLE A. ROEDER, Joint Tenants; EDRIS EDWARDS;

EDWARD F. JANDA and ANNA MAE JANDA, Joint Tenants; HARRY ZWICK; ARTHUR H. ODEN; JOLEEN J. OTTLINGER; and WILLIAM L. BEMIS and DOROTHY BEMIS, Joint Tenants,

Plaintiffs-Appellees,

v.

CUDAHY COMPANY, a Delaware Corporation, and GENERAL HOST CORPORATION, a New York Corporation,

Defendants-Appellants.

This matter comes on for consideration of defendants-appellants' petition for rehearing, with suggestion for rehearing en banc in the captioned appeals.

Upon consideration of the merits of the petition for rehearing, the petition is denied by the panel to whom the case was submitted.

The petition for rehearing having been denied by the panel to whom the case was submitted, and no member of the panel nor judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, Fed.R.App.P. 35, the suggestion for rehearing en banc is denied.

/s/ Robert L. Hoecker
ROBERT L. HOECKER
Clerk

Supreme Court, U.S.
FILED
FEB 11 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1186

In The
Supreme Court of the United States
October Term,-1988

CUDAHY COMPANY and GENERAL HOST CORPORATION,

Petitioners,

v.

CECIL W. MILLER, *et al.*,

Respondents.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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STATEMENT OF THE CASE

In this diversity action, the twenty-nine plaintiff farmers were awarded over three million dollars in lost crop profits for the period 1975-1983, and defendants were assessed ten million dollars in punitive damages, after plaintiffs proved that their groundwater had been maliciously, wantonly, and persistently polluted by defendants' salt mine near Lyons, Kansas (App. at 2, 117, 169-172, 176),[1] which continued to pollute "up to the present time." (App. at 137) After a thirty-three day bench trial (*i.e.*, actual trial days), the District Court issued a lengthy Opinion and Order containing no less than one hundred fifty-seven separate findings of fact concerning plaintiffs' actual and punitive damages claims. (App. at 117, 118-165)

The Court of Appeals, having thoroughly examined the entire record, found that "the district court's comprehensive factual findings . . . are amply supported by the record." (App. at 3)

The District Court's factual basis for imposing punitive damage is found at pages 145 to 154 of the Appendix (Factual Findings 109-129). In affirming the trial court's decision, the Court of Appeals held that

> the award of punitive damages is clearly supported by the evidence. . . . It is readily apparent that appellants created the nuisance and "persistently maintain[ed] it with a reckless disregard for the rights of others." *Newman v. Nelson*, 350 F.2d 602, 604-05 (10th Cir. 1965). Appellants' conduct was deliberate,

---

1. "App." refers to defendants' "Appendix to Petition for a Writ of Certiorari," etc.

> with full knowledge of the consequences and with a marked indifference thereto.

(App. at 16)

For example, when faced with pollution complaints from its neighbors and from the responsible regulatory agency (the Kansas Department of Health and Environment [KDHE]), American Salt responded with defiance, intimidation or deceit. (App. at 150, 162-165) American Salt deliberately polluted in violation of the law, cavalierly accepting a fine when this was the cheapest and most profitable way to do business. (App. at 148-150) When plaintiff Cecil Miller threatened to sue American Salt, its president, Otto Rueschhoff,

> dared Miller to file suit and boasted that the money and lawyers available to American Salt would enable it to drag any litigation out for years, bankrupt Miller in the process, and take his land from him.

(App. at 150) After KDHE ordered the salt plant to hire an independent engineering firm to assess its ongoing pollution problems, American Salt falsified the "independent" report by purging it of much evidence of serious ongoing pollution. (App. at 162-165)

The District Court found as fact that General Host, the parent corporation, far from being an ordinary, passive shareholder, involved itself actively in the management of the American Salt plant and bore direct responsibility for the ongoing pollution. The salt plant's reprehensibly lax maintenance practices were due in part to General Host's demands for "constantly increasing prof-

its." (App. at 151)[2] General Host was deeply involved in the salt plant's actual management and in the decisions on how to deal (or fail to deal) with the pollution problem. (App. at 151-154) As the District Court found,

> [b]y virtue of its actual notice of the pollution occurring at American Salt's plant, its refusal to take steps to correct that pollution, and its active participation in the management affairs of American Salt, General Host effectively ratified [the] past acts [of American Salt's president] and authorized him to continue to operate the plant in the same manner in the future, despite the fact that his complete indifference to and reckless disregard of the environment and the rights of the adjacent landowners made him unfit to direct the policy and activities of the corporation.

(App. at 153)

The court therefore found that punitive damages in the amount of ten million dollars were warranted and that

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2. In assessing punitive damages, the District Court found as fact that:

   a) American Salt's consistent corporate philosophy was to maximize profits while minimizing any expenses not related to increased production and profits;

   b) Despite being aware of the grievous environmental dangers of salt-solution mining, American Salt's management reached a conscious and reasoned business decision to maximize profits at the expense of required preventive maintenance of their complex physical plant and equipment;

   c) The record was "rife" with pollution caused by deterioration of the salt company's physical plant and equipment; and

   d) Corners were cut even when major repairs or additions to the plant were in fact undertaken.

   (App. at 145-146)

the assessments must be imposed against both General Host and its subsidiary. (App. at 153-154)

The District Court also found and concluded that, under Kansas law, plaintiffs should recover the crop profits which they had lost from 1975 to 1983 through their inability to irrigate because of the groundwater pollution caused by defendants (App. at 138-142, 168-169), who still continued to pollute "up to the present time." (App. at 125-138)

———o———

REASONS FOR DENYING THE WRIT

I. PETITIONERS' CONSTITUTIONAL CLAIMS WERE NOT PROPERLY PRESENTED TO THE COURTS BELOW AND ARE NOT PROPERLY BEFORE THIS COURT.

Defendants' failures in the courts below to raise the constitutional issues now presented preclude certiorari.

Defendants' *only* attempt *ever* to raise a "constitutional" issue before the District Court occurred one and one-half years after the District Court's "Opinion and Order" awarding actual and punitive damages. The gist of this vague, passing "argument" was that defendants were constitutionally entitled to an evidentiary hearing on their Motion for New Trial on "newly discovered evidence" grounds, because punitive damages were "essentially criminal." (2/10/86, Defendants' Memorandum in

Support of Motion for Oral Argument, etc., pp. 6-7) This argument has not appeared since.[3]

The procedural argument presented to the District Court, *i.e.*, that an evidentiary hearing on their new trial motion was constitutionally required (even after thirty-three actual trial days!), failed to preserve any of the defendants' current constitutional issues, which sweepingly attack the actual and punitive damages on the merits.

Hence, defendants' present "constitutional" arguments were never raised before the District Court at all. Even on appeal, the "constitutional" arguments on punitive damages were argued only perfunctorily. Apparently such arguments were included only to create a "federal" issue to use in seeking certiorari.

Defendants' other "constitutional argument," *i.e.*, the novel contention that the actual-damages award was unconstitutional, was first raised when defendants petitioned the Tenth Circuit for rehearing.

---

3. In discussing the argument, the District Court said:

> [t]o suggest that this Court has not afforded defendants a meaningful opportunity to be heard is laughable. In addition to a very lengthy trial, numerous hearings have been held in this matter, some of them as long as a normal trial. At each of these hearings defendants have been given full opportunity to present evidence and to examine plaintiffs' evidence. . . . The Court has noted at some of these hearings that, if anything, this case was being "due processed to death." For the defendants to suggest now, after ten years of activity, months of trial time, and volumes of pleadings that due process is being denied them is perhaps one of the most outlandish claims this Court has ever heard.

(App. at 58-59)

All defendants' arguments therefore come so late as to preclude review by this court. *Hoover v. Ronwin*,, 466 U.S. 558, 574, n. 25, 80 L. Ed. 2d 590, 104 S. Ct. 1989 (1984) (Supreme Court will not consider argument raised for first time in response to rehearing motion before Court of Appeals); *Mirce v. DeKalb County*, 433 U.S. 25, 53 L. Ed. 2d 557, 97 S. Ct. 2490 (1977) (issue neither pleaded, argued, nor briefed in lower courts will not be considered by U.S. Supreme Court).

II. NO SUBSTANTIAL CONSTITUTIONAL QUESTIONS EXIST WITH RESPECT TO THE PUNITIVE DAMAGES AWARD IN THIS CASE, WHERE THE TRIAL COURT'S FINDINGS OF FACT WERE "AMPLY" SUPPORTED BY THE RECORD; THE RATIO BETWEEN PUNITIVE AND ACTUAL DAMAGES WAS NOT ARBITRARY OR EXCESSIVE; THE PUNITIVE DAMAGES WERE IMPOSED BY THE DISTRICT JUDGE, NOT A JURY; AND THE DUE PROCESS RIGHTS OF DEFENDANTS WERE AMPLY PROTECTED.

The district judge, whose factual findings were "amply" supported by the record, concluded that the salt plant's management had wantonly shown "a reckless disregard for the rights of others" and had acted maliciously, *i.e.*, had intentionally performed wrongful and injurious acts with full knowledge of their character and without cause or excuse. (App. at 170-171) The Court of Appeals affirmed these findings *in toto*. (App. at 16)

The imposition of punitive damages upon defendants was not the product of "uncontrolled" jury discretion. Rather, it was the product of the informed, intelligent discretion of a federal district judge, sitting as finder of

fact and rendering conclusions of law pursuant to definite Kansas standards, App. at 170-171. *See inter alia Kline v. Multi-Media Cablevision, Inc.*, 233 Kan. 988, 989, 666 P.2d 711 (1983). The definitions of "wanton" and "malicious" conduct applied by the district judge here are no more "vague" or "arbitrary" than are similar standards universally recognized and applied in both civil and criminal cases.

Further, the ratio between actual and punitive damages here is only approximately 1:3, and thus no more arbitrary or excessive than, for example, the treble-damages provisions of the antitrust laws, 15 U.S.C.A. § 15, which are clearly constitutional.

As the District Court noted, defendants cannot with a straight face claim that their "due process" rights were violated, *i.e.*, that they were not given a meaningful opportunity to be heard before the District Court. In fact, the case was almost "due processed to death." (App. at 58-59)

Thus, in this bench trial, where the Court of Appeals held that the trial court's findings, conclusions, and judgment were amply supported, where Kansas standards for the imposition of punitive damages are quite clear, where no constitutional questions about the 1:3 ratio between actual and punitive damages for the ongoing pollution can reasonably be raised, and where the defendants' due-process rights were more than amply protected, there simply are no constitutional issues for this court to inquire into.

III. PETITIONERS' CONSTITUTIONAL ARGUMENTS AGAINST THE ACTUAL DAMAGES AWARD ARE TRANSPARENTLY MERITLESS.

For the very first time on petition for rehearing before the Tenth Circuit, defendants suggested a) that an award of actual damages against a tortfeasor, to compensate the plaintiff for an injury done by that tortfeasor, is a "taking of property for public use" for which the tortfeasor is entitled to just compensation, and b) that the courts are not constitutionally permitted to compensate fully an injured property owner for loss of profits caused by ongoing pollution which continues "up to the present time." (App. at 137) In other words, defendants argue that, once they have paid damages equal to the value of the land, they acquire a *prescriptive* right to pollute without paying further damages, and that they hold this right *by virtue of the Constitution of the United States!* They thus assert that the "takings" clause a) gives them the constitutional right to condemn their neighbors' properties to their own use and b) further sets a limit on how much they will have to pay. Merely to state these arguments is to make manifest their absurdity. The courts below fairly compensated the twenty-nine plaintiff farmers for their actual damages for ongoing pollution, *i.e.*, lost crop profits, without in any way offending the Constitution of the United States.

IV. TO HOLD DEFENDANTS' CERTIORARI PETITION PENDING THE COURT'S DISPOSITION OF BROWNING-FERRIS WOULD BE INAPPROPRIATE, SINCE a) BROWNING-FERRIS IS INAPPOSITE ON ITS FACTS AND b) FURTHER DELAY IN THIS TWELVE-YEAR LITIGATION WOULD UNFAIRLY PREJUDICE THE PLAINTIFFS AND REWARD DEFENDANTS' TACTICS OF DELAY.

To hold the certiorari petition pending resolution of the *Browning-Ferris* case would serve no purpose, since the two cases are factually dissimilar. *Browning-Ferris* involved a ratio of actual to punitive damages of *over 1:100. Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 845 F.2d 404, 406-407 (2d Cir. 1988), *cert. granted*, No. 88-556 (Dec. 5, 1988). The comparable ratio in the instant case is only 1:3 and cannot be called arbitrary or excessive. Further, whereas in *Browning-Ferris* the punitive damages were entered on a general jury verdict, *Id.* at 406-407, the punitive damages in the instant case were entered following a lengthy bench trial by a federal district judge, who assessed punitive damages against an ongoing polluter based on twenty-one specific factual findings under Fed. R. Civ. P. 52(a). The two cases simply are not comparable.

Further, any more delay in the disposition of this case would be unfairly prejudicial to the plaintiffs. As the trial court found, the defendants boasted even before this suit was filed that they would win by tactics of attrition.

> When he was personally confronted by angry landowners, Rueschhoff [American Salt's president] preferred to employ a strategy of intimidation. . . .

> [W]hen [plaintiff] Cecil Miller finally threatened legal action against American Salt, Rueschhoff dared Miller to file suit and boasted that the money and lawyers available to American Salt would enable it to drag any litigation out for years, bankrupt Miller in the process, and take his land from him. It appears that at least the first part of this boast was not an idle one.

(App. at 150)

So far, defendants have succeeded in dragging out the litigation for almost twelve years. In asking this court to hold their certiorari petition pending the outcome of the *Browning-Ferris* case, defendants seek yet further delays. Plaintiffs respectfully submit that for the court to accommodate defendants in this respect would be unconscionable. It has been *almost twelve years* since suit was filed. In that time, a number of the plaintiffs have died. As the District Court ruefully noted, there is a growing resemblance between this case and the futile, interminable *Jarndyce v. Jarndyce* suit of *Bleak House*: despite over a decade of litigation, the twenty-nine plaintiff farmers have yet to see a penny in compensation for the millions of dollars in losses they have suffered because of defendants' ongoing pollution. Defendants' request that their certiorari petition be held, pending disposition of *Browning-Ferris*, should be denied.

———o———

CONCLUSION

The Petition for Writ of Certiorari should be denied.

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No. 88-1186

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

CUDAHY COMPANY and GENERAL HOST CORPORATION,
Petitioners,

v.

CECIL W. MILLER, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

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REPLY BRIEF OF PETITIONERS

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REPLY BRIEF OF PETITIONERS

Respondents, in their opposition, do not seriously contend that this petition does not raise fundamental and recurring constitutional questions worthy of review by this Court. Indeed, respondents do not—and could not—dispute that the issues relating to constitutional limits on punitive damages are related to the issues already before the Court in *Browning-Ferris Industries v. Kelco Disposal, Inc.*, No. 88-556, and therefore, consistent with this Court's customary practice in such situations, the proper disposition of this case is, at the very least, to hold this petition pending the outcome of *Browning-Ferris.*

1. Respondents contend that certiorari should be denied because "any more delay in the disposition of this

case would be unfairly prejudicial to the plaintiffs." Brief in Opp., 9-10. But respondents do not explain what "unfair prejudice" they will suffer if the petition is held. Because the judgment is fully secured by a supersedeas bond and respondents are earning interest on their judgment, there is no basis (or authority) for the proposition that the time required for this Court to review a judgment gives rise to "prejudice" to the prevailing party below. There is no reason to deny review, if otherwise warranted, simply because respondents would rather execute on the existing judgment today rather than risk review by this Court.

2. Respondents state that "petitioners' constitutional claims were not properly presented to the courts below and are not properly before this Court." Brief in Opp. 4. In fact, the central issue in the petition—whether the Due Process Clause or the Excessive Fines Clause places any limits on the otherwise unrestrained discretion of the district court to award punitive damages—was specifically raised in, and addressed by, the Tenth Circuit and therefore is appropriate for review by this Court. The court of appeals rejected petitioners' argument that the damage award was "unconstitutional" because of the absence of any "limits on the amounts of such awards" on the ground that petitioners' have "cited no persuasive federal constitutional authority to support their argument." Pet. App. 19a.[1]

With respect to the separate constitutional claim involving compensatory damages, petitioners argued on rehearing that the damage rule adopted by the courts below

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[1] Petitioners reiterated their due process and excessive fines arguments at the rehearing stage in the Tenth Circuit. *See* Pet. for Rehearing, 9-10 ("Punitive damages of the magnitude and quality involved in this case violate both the Fifth and Fourteenth Amendments' prohibitions against deprivations of property without due process of law and the Eighth Amendment's prohibition against excessive fines").

"would violate both the Takings and Substantive Due Process Clauses of the Fifth and Fourteenth Amendments." Pet. for Rehearing, 8. The Tenth Circuit's order recited that the petition for rehearing, including this issue, was considered on "the merits," and rehearing was denied. Thus, respondents' suggestion that the constitutional issues at stake were "neither pleaded, argued nor briefed in the lower courts" (Brief in Opp. 6) simply is incorrect: both constitutional claims were raised in, and ruled upon by, the court of appeals. See *Carlson* v. *Green*, 446 U.S. 14, 17 n.2 (1980) (Court may consider "important, recurring issues" even when "not presented below").

3. With respect to the merits or the importance of the constitutional claims, respondents do little more than offer a truncated summary of the facts and declare, *ipse dixit*, that "there simply are no constitutional issues for this court to inquire into." Brief in Opp. 7; see *id.* at 8.[2] For example, respondents do not even address petitioners' argument that imposition of the award, in the circumstances of this case, violates "notions of proportionality between the punished activities and the penalty imposed." Pet. 17 (citing *Solem* v. *Helm*, 463 U.S. 227 (1983)).[3] Rather, in response to the argument that the

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[2] Instead of addressing the legal issues, respondents focus on specific facts. For example, respondents *twice* (in a ten page brief) quote at length from the 1984 district court opinion a passage to the effect that *American Salt's* president responded in kind to respondent Miller's "threatened legal action." Pet. App. 150. Accepting this hearsay statement at face value (as did the district court), it nevertheless fails to respond to petitioners' fundamental contention that the damage award against General Host Corporation is completely disproportionate to any showing of misconduct by General Host itself. Pet. 6 n.8, 7-8, 11 n.14.

[3] One particular aspect of the "arbitrariness" of the punitive damages award was the absence of any limits on how far back in history the fact finder was able to look in order to determine liability for punitive damages. *See* Pet. 11 n.14, 13 n.16. Thus, the

Eighth Amendment imposes limits on punitive damages, respondents merely assert that the numerical proportion of actual to punitive damages (1 to 3) was not "arbitrary or excessive" and was therefore "clearly constitutional." Brief in Opp. 7.[4]

Similarly, in response to petitioners' suggestion that this case presents issues—in particular, a challenge to punitive damages as a violation of due process—related to, but not raised in, the petition in *Browning-Ferris*, respondents argue that *Browning-Ferris* is distinguishable because (1) the numerical ratio of punitive to compensatory damages in *Browning-Ferris* was higher than it is in this case; and (2) *Browning-Ferris* was a jury trial and this case was not. Brief in Opp. 9.[5] Respondents' arguments are simply irrelevant to petitioners' claim that the "lack of sufficient standards governing punitive damages awards . . . violates the Due Process

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award in this case could only be imposed by employing contemporary standards of environmental practice to conduct that took place many years before—long before petitioner General Host acquired Cudahy. By invoking unrealistic standards to justify enormous punitive awards, the decision below significantly discourages acquisitions and makes abandonment, rather than clean-up, the only practical means to terminate the extraordinary punitive liabilities which can attach to acquired facilities that have been a source of pollution.

[4] Respondents also did not dispute that the federal district court's judgment that punitive damages were appropriate was in direct contradiction to the policy judgment of the Kansas legislative and executive branches. Pet. 7-8 n.11.

[5] It is impossible to know whether holding this petition for *Browning-Ferris* would "serve no purpose," as respondents' contend, until this Court announces the holding in *Browning-Ferris*. The Tenth Circuit rejected petitioners' Eighth Amendment argument because of an absence of "persuasive federal constitutional authority" (Pet. App. 19a) and petitioners ask that, at the very least, the Tenth Circuit be allowed to consider this case in light of *Browning-Ferris*, if that is appropriate.

Clause." Pet. 12 (*quoting Aetna Life Ins. Co.* v. *Lavoie*, 475 U.S. 813 (1986)).[6]

Petitioners also contended that the imposition of damages (for harm to the groundwater beneath respondents' land) that far exceeds the undisputed value of the land—and which leaves open the potential for continuing biennial damage awards—violates the Takings and Due Process Clauses. Respondents merely assert that such arguments are "meritless." Brief in Opp. 8. Petitioners explained that the issue is novel, but that is because the damages formula adopted by the courts below gives rise to a situation where "compensatory" damages bear no rational relation to the harm suffered by the respondents. See *Nollan* v. *California Coastal Comm'n*, 107 S.Ct. 3141 (1987). Respondents do not dispute petitioners' claim that "the lower courts' judgments have effectively converted respondents' farmlands into a gold mine" (Pet. 21); nor do they contest that the decision below potentially gives rise to additional damage awards, every two years, for most of the next century. Pet. 10.

Finally, respondents, by their silence, effectively concede that the award in this case will create a significant disincentive for manufacturers in the Tenth Circuit to undertake environmental clean-up efforts. For that reason alone, review of the compensatory damage award is warranted.

At bottom, respondents' Brief in Opposition does nothing to undermine petitioners' showing that this case presents fundamental and recurring questions of federal

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[6] Respondents simply miss the point of petitioners' due process argument; they dismiss that argument as a procedural issue involving "a meaningful opportunity to be heard." Brief in Opp. 7. In fact, petitioners' argument has nothing to do with procedure; rather, petitioners contended that the "wholly standardless discretion" of a trier of fact to impose punitive damages "appears inconsistent with due process." Pet. 12 (*quoting Bankers Life and Casualty Co.* v. *Crenshaw*, 108 S.Ct. 1645 (1988)).

constitutional law concerning what, if any, rational limits must be imposed upon awards of punitive and compensatory damages. Moreover, respondents do not, and cannot, dispute that the decision below should have a long-standing and detrimental impact that extends far beyond the parties. Given the importance of the issues and the starkness of the constitutional claims in the circumstances of this case, the questions presented clearly are worthy of review by this Court.

CONCLUSION

For the foregoing reasons and those presented in the petition, the petition for a writ of certiorari should be granted.

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Petitioners,

v.

CECIL W. MILLER, *et al.*,
– Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE AND BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

MOTION OF THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION

Pursuant to Rule 36 of the Rules of this Court, the National Association of Manufacturers of the United States of America ("NAM") requests leave to file the accompanying brief as *amicus curiae* in support of the petition for writ of certiorari.

NAM is an association of approximately 13,500 companies and subsidiaries that together employ eighty-five percent of all manufacturing workers in the United States and produce more than eighty percent of this nation's manufactured goods. NAM is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council.

As the representative of American manufacturing concerns, NAM has a vital interest in ensuring that there is rationality and fairness in the rendering of damage awards in tort cases. Both punitive damages and com-

pensatory damages should be measured by standards that are economically reasonable, responsible and consistent with fundamental understandings of economic value. At a minimum, there should be some standards. Absent reference to reasonable standards to govern tort awards, American businesses are potentially subjected to irrational awards that may threaten their ability to compete effectively in international markets, or, in extreme cases, merely to survive in American markets.

The compensatory and punitive damages awards assessed in this case exemplify the type of novel and excessive tort damages awards that can result absent limitations and standards to assure (1) that compensatory damages awards approximate actual losses incurred by plaintiffs, and (2) that punitive damages awards bear some relationship to the gravity of the wrong committed.

Accordingly, as the principal voice of United States manufacturing businesses, NAM seeks to submit this *amicus curiae* brief in support of the petition for a writ of certiorari in order to identify the constitutional restraints on compensatory and punitive damages awards in tort cases and to stress the importance of resolving these issues in this Court. NAM respectfully requests that its motion for leave to file the accompanying brief as *amicus curiae* be granted for these purposes.

Respectfully submitted,

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BRIEF FOR THE NATIONAL ASSOCIATION OF MANUFACTURERS OF THE UNITED STATES OF AMERICA IN SUPPORT OF THE PETITION

INTEREST OF AMICUS CURIAE

NAM is an association of approximately 13,500 companies and subsidiaries that together employ eighty-five percent of all manufacturing workers in the United States and produce more than eighty percent of this nation's manufactured goods. NAM is affiliated with 158,000 additional businesses through its Associations Council and the National Industrial Council.

NAM has a strong interest in ensuring that compensatory and punitive damages in tort lawsuits are measured responsibly and rationally. The rate of increase in tort litigation is the topic of much debate in courts, legislatures and the media. For example, in connection with product liability litigation, objective empirical data show

that since 1980 there has been a dramatic increase in the size of damages awards. *See* D. Hensler, M. Vaiana, J. Kakalik & M. Peterson, *Trends in Tort Litigation: The Story Behind the Statistics* 16-18 (1987) ("the median for product cases has risen very sharply" and "in the case of high-stakes suits such as product liability and malpractice, the growth in the average award has been truly explosive, reflecting increases ranging from 200 to more than 1,000 percent").

The "explosion" in damages awards has created a climate of uncertainty for United States manufacturers. In some cases, it has caused manufacturers to stop producing socially useful and lifesaving products such as vaccines against childhood diseases. *See* H.R. Rep. No. 908, 99th Cong., 2d Sess., pt. 1, at 4-7 (1986); *see also* Schwartz & Mahshigian, *National Childhood Vaccine Injury Act of 1986: An Ad Hoc Remedy or a Window for the Future?*, 48 Ohio St. L. J. 387 (1987). Manufacturers have decided against introducing new and socially desirable products because of liability fears. *See* E.P. McGuire, *The Impact of Product Liability* vii (1988); *Insurance Costs Deter AIDS Vaccine*, 1 Liab. & Ins. Bull. (BNA), at 5 (Nov. 3, 1986) ("[T]his general climate of uncertainty is something that deters many pharmaceutical companies from being involved in AIDS vaccine research.") In a far greater number of cases, the need to anticipate and fund potential litigation and potentially extreme damages awards (or simply to pay insurance premiums in anticipation of such awards) is a major disadvantage for American businesses in their attempt to compete with foreign businesses. *See* H.R. Rep. No. 748, 100th Cong., 2d Sess., pt. 1, at 23-24 (1988) ("Without having to absorb the costs of product liability exposure for most of their sales, foreign corporations have an obvious price advantage. In Japan and Europe, product liability laws are more stable, litigation less frequent, and large damage awards uncommon").

It is NAM's view that extreme and irrational compensatory and punitive damages awards result from the failure of the courts and the legislatures to enunciate responsible standards for measuring such damages. At a minimum, the Constitution requires that standards be set before excessive damages awards may be levied.

STATEMENT

This case arises out of a civil action for damage to real property brought by respondents who are owners and lessees of farm land located near a plant operated by the American Salt Company, an operating division of petitioner Cudahy Company. Respondents have claimed that American Salt Company's salt mining operations polluted a natural aquifer underlying their property and made their property unfit for agricultural irrigation.

Respondents sought compensatory damages in the amount of $1.26 million, a figure based on the $450 dollars per acre difference in the local fair market price per acre of irrigable land ($1,100 per acre) and the local fair market price per acre of dry land ($650 per acre). Complaint ¶ 10. The district court, following a bench trial, awarded respondents $3.06 million in "temporary damages" for lost crop profits for the period 1975-1983 and $10 million in punitive damages. 592 F.Supp. 976, 1006 (D. Kan. 1984).[1]

Petitioners appealed. Petitioners argued that the punitive damages award violated the Eighth and Fourteenth

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[1] The $10 million punitive damages award was held in abeyance pending the district court's evaluation and assessment of petitioners' cleanup efforts. The court retained jurisdiction to reduce the punitive award if petitioners proposed and implemented a feasible cleanup plan. 592 F. Supp at 1007-09. The district court ultimately rejected all proposals submitted and ordered petitioners to pay the $10 million punitive damages award together with interest from the initial date of judgment. 656 F. Supp. 316, 351-57 (D. Kan. 1987).

Amendments to the United States Constitution. App. at 19. The United States Court of Appeals for the Tenth Circuit affirmed. 858 F.2d 1449 (1988). On petition for rehearing, petitioners attacked the compensatory damages award, as explained by the Court of Appeals, as violative of the Takings and Due Process Clauses of the Fifth and Fourteenth Amendments because the award exceeded the reduction in value of the property that had been damaged. *See* Petition for Rehearing and Suggestion of Rehearing En Banc at 8, *Miller v. Cudahy Company*, No. 87-1502 (October 21, 1988). The Court of Appeals denied the petition for rehearing and the petition for certiorari followed.

REASONS FOR GRANTING THE PETITION

I. STANDARDLESS AWARDS OF PUNITIVE DAMAGES ARE INCONSISTENT WITH THE CONSTITUTION.

The Court now has before it the case of *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, No. 88-556, which presents the question whether the Excessive Fines Clause of the Eighth Amendment requires that punitive damages be set, not through the unrestrained exercise of discretion, but by reference to articulated standards and consistent with the principle of proportionality. There must be some articulated basis for measuring the *amount* of a punitive damages award in order to ensure some degree of rationality in the process of setting damages. And, consistent with the Constitution, there must be a relationship between the gravity of the wrongdoing and the punitive damages that are imposed.

This case presents an issue nearly identical to that raised in *Browning-Ferris*. The $10 million punitive damages judgment imposed by the district court was totally out of proportion to the wrongfulness of petitioners' conduct and was not subject to any previously ar-

ticulated (or presently articulable) standard for determining the appropriate amount of the award. At a minimum, this case should be held for the disposition of *Browning-Ferris*, and remanded to the Court of Appeals for further proceedings consistent with the disposition of that case.

This case also raises additional, substantial constitutional questions regarding the measure of compensatory and punitive damages not presented by *Browning-Ferris*. Therefore, even if the Court's disposition of *Browning-Ferris* does not alone require this case to be reversed and remanded, the questions presented in this case regarding the Due Process and Takings Clauses warrant a grant of certiorari. The significance of these issues is reflected by the grant of certiorari in *Browning-Ferris*. The question whether the Constitution imposes constraints on the standardless or irrational assessment of damages is important in a practical sense whether the source of the constraint is the Due Process Clause or the Excessive Fines Clause of the Eighth Amendment. The substantiality of the questions in a legal sense is demonstrated below.

Amicus notes that the Court already has before it at least one other petition in which the due process issues raised by standardless punitive damages awards have been properly raised. *The Goodyear Tire & Rubber Company v. Hodder*, No. 88-626. *Amicus* also joined in an *amicus* brief in support of that petition.

A. This Court Should Consider Whether a Standardless Award of Punitive Damages Violates the Due Process Clause.

The imposition of a $10 million punitive damages award in this case violates the Due Process Clause of the Fifth and Fourteenth Amendments to the United States Constitution.[2] It is important to note that this $10 mil-

[2] We refer to the Fifth, as well as to the Fourteenth Amendment, because while the law being applied by the court below was state

lion punitive award was rendered in the context of damage to property, not to a sympathetic, seriously injured victim: hence, the award is not some aberration that can be discounted as the product of "jury prejudice." It is of equal significance that this occurred in a case tried to a judge, not a jury; indeed, the judge's reasons for rendering a punitive damages award here reflected only his own idiosyncratic view of appropriate punishment. He could not reference any established standard for measuring a punitive damages award (apart from an incorrect reference to petitioners' net worth), and he did not attempt to test his award against comparable awards in any similar action.

These aspects of the case demonstrate that the imposition of punitive damages, where the government has *not* enunciated clear standards or established articulable points of reference, is totally unbridled, even under the best of circumstances, and inevitably leads to extreme and anomalous results. Rationality is foreclosed because state "law" on punitive damages, which the district court attempted to apply in this case (and the United States Court of Appeals for the Tenth Circuit attempted to be faithful to), is simply a will-o'-the-wisp: it appears to exist, but in practical application, it is a phantom.

Under the English system of our forebears and our American system of justice, we are accustomed to justice measured by articulable legal standards. Punitive damages is an extraordinary exception to this basic premise of our legal system. The facts of this case, as petitioners' brief shows, present a paradigm of standardlessness.

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law, the court applying that law, and whose authority stands behind the judgment, is a federal court.

1. *The Due Process Clause Requires that State Law Clearly Define the Offense; It Did Not in this Case.*

The prevailing process of imposing punitive damages, whether by judge or jury, violates due process because it is bereft of meaningful standards defining the circumstances under which an award of damages *shall* be rendered. A hallmark of due process is that "laws must provide explicit standards for those who apply them." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). The requirement of specificity in legal standards is most crucial in areas where courts and other government offices exercise great discretion. *Cf. Santosky v. Kramer*, 455 U.S. 745, 763 (1982) (enhanced procedural safeguards are required where factfinder possesses "unusual discretion" to weight facts and reach dispositive determinations). Moreover, the Court has long recognized that problems of Constitutional moment are raised by "fines . . . [that] are so grossly excessive as to amount to a deprivation of property without due process of law," *Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86, 111 (1909), and that due process "places a limitation upon the power of the states to prescribe [civil] penalties . . . [which are] wholly disproportionate to the offense and obviously unreasonable." *St. Louis, I. M. & S. Ry. v. Williams*, 251 U.S. 63, 66-67 (1919).

In most jurisdictions, a judge or a jury considering whether to impose punitive damages is guided by no more than vague, nondescriptive rhetoric. In the instant case the district court, in order to award punitive damages under Kansas law, had to find that the petitioners engaged in "fraud," "malice," "gross negligence," or "oppression." 592 F.Supp. at 1006. In other situations, state laws speak of "willful or wanton misconduct,"[3] "reck-

[3] *See, e.g., Cloroben Chem. Corp. v. Comegys*, 464 A.2d 887 (Del. 1983).

less disregard,"[4] "gross negligence,"[5] or "rudeness" or mere "caprice."[6] In that regard, it is imperative to appreciate that even when the vague "standards" allowing a punitive award are deemed by a jury or court to have been met, Kansas law and the "law" of other states simply provide that punitive damages *may* be imposed. Once again, there are *no* standards or *rules* that indicate when this "may" becomes "should." This explains why, on another day, another court *may* have imposed *no* punitive damages for precisely the same conduct. Still another court might have said $300,000, another $500,000, or another $20,000,000 in punitive damages. No court would be "right" and no court would be "wrong," for there are *no* measures of right or wrong under the process by which punitive damages are imposed in the State of Kansas and in many other states.

Due process requires more. Whether the defendant is an individual, a corporation, a partnership or group, he or she is entitled to a clear standard, indicating what type of conduct will result in what is, in its practical implications, a penal sanction.[7] In the instant case, the

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[4] *See, e.g.*, Conn. Gen. Stat. Ann. § 52-240b (West Supp. 1988).

[5] *See, e.g.*, Tex. Civ. Prac. & Rem. Code Ann. § 41.003 (Vernon 1987).

[6] *See Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976).

[7] Under the law of torts, and by any reasonable definition, punitive damages are penal in nature. *See* W. Prosser & W.P. Keeton, *The Law of Torts* § 2 at 9 (5th ed. 1984) ("Such damages are given to the plaintiff over and above the full compensation for the injuries, for the purpose of punishing the defendant, of teaching the defendant not to do it again, and of deterring others from following the defendant's example"); C. McCormick, *Handbook on the Law of Damages* § 77 at 275 (1935) ("Exemplary damages are assessed for the avowed purpose of visiting a punishment upon the defendant and not as a measure of any loss or detriment of the plaintiff"); D. Dobbs, *Handbook on the Law of Remedies* § 3.9 at 204 (1973) ("Punitive damages are sums awarded, usually as

vagueness of the standard and confusion in its execution appear to have resulted in a sanction imposed against the petitioners for conduct that occurred even before they acquired a particular property. *See* Pet. Br. at 11 n.14. Due process requires that punishment be imposed for wrongful conduct engaged in by the defendant itself; due process also requires that the circumstances giving rise to punishment be defined with clarity.

2. *Due Process Requires Articulated, Ascertainable Standards and Boundaries as the Precondition for Imposition of Punitive Damages.*

Beyond the relative standardlessness with respect to liability, punitive damages are routinely awarded without reference to any standard whatsoever for measuring their quantum. As the instant case reflects, such awards are not cabined by minimum nor maximum penalties. Indeed, the passages below constitute the entirety of the district court's findings of fact and conclusions of law relative to the appropriate *amount* of punitive damages to be imposed in this case:

> The Court finds that any award of punitive damages . . . must be determined with due regard to the net worth of the defendants . . . In view of the considerable financial resources controlled by General Host and its net assets of over $450,000,000, the Court finds that an appropriate punitive damage award would amount to $10,000,000. . . .

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punishment or deterrent levied because of particularly aggravated misconduct on the part of the defendant"); W. Prosser, J. Wade & V. Schwartz, *Torts: Cases and Materials* ch. 10 at 528-29 (8th ed. 1988) ("awarded to [plaintiff] for the purpose of punishing the defendant, of admonishing him not to do it again, and of deterring others from following his example"); M. Franklin & R. Rabin, *Tort Law and Alternatives: Cases and Materials* ch. 11 at 622 (4th ed. 1987) ("awarded to punish the defendant or to make an example of that defendant so that others will avoid this very serious kind of misconduct").

> The Court concludes that the facts and circumstances of this case are such that the Court should exercise its discretion to find the defendants liable to the plaintiffs for punitive damages, in the amount of $10,000,000.

592 F. Supp. at 998, 1007.

The court cited to no established principles which link punitive damages to the "net assets" of the wrongdoer.[8] Nor did it suggest any guidelines which in any way constrained or directed the "exercise [of] its discretion." The implication could not be more clear: a federal judge did what he "felt" was right. The award was then reviewed by a distinguished appellate court, which apparently did what it "felt" best. Nevertheless, no law was ever applied, because there was no law to apply. As a result, petitioners' brief reveals, punitive damages were imposed totally out of proportion to the wrongfulness of petitioners' conduct. *See* Pet. Br. at 13. The essence of the problem posed by this and most other punitive damages schemes as currently constructed is that courts are compelled to operate almost totally by "feel," rather than by rules.

As our criminal law clearly reflects, punishments should be bounded by minimums and maximums. It is clear, in this regard, that the imposition of punitive damages differs little from a criminal fine in terms of its impact. A sanction of this type imposes a harsh stigma; its imposition clearly has an economic impact. Unless punitive damages are confined within a rational and reasonable range, their award predictably turns out, as in this case, to be "wholly disproportionate to the offense." *Williams*, 251 U.S. at 67. Hence imposition of such

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[8] Nor, as petitioners point out, did the court even apply appropriately its *own* standard for punitive damages awards. In fact, petitioner General Host's *total* assets for the period in question were about $450 million; its "net assets" were $147 million. Pet. Br. at 6 n.8.

awards, without regard to specific standards, violates any principled understanding of the term "due process."

Irrespective of the result in *Browning-Ferris*, this Court should review this case (or one of the other cases that squarely raise the question of the due process limitations applicable to punitive damages awards) and hold that, at a minimum, due process requires rational, reasonable and previously articulated standards, or boundaries, for determining what conduct will give rise to punitive awards and how those awards shall be measured. If due process does not carry such import, it carries little import at all. The instant case, devoid of any apparent prejudice in the courts below, manifests clearly the need for the development of standards for the imposition of this type of punishment; on the basis of the trial court's decision, this case is especially appropriate for review.

B. This Court Should Consider Whether the Award of Punitive Damages in this Case Violates the Excessive Fines Clause.

For the reasons set forth in the brief of petitioners and supporting *amici* in *Browning-Ferris*, the nature of punitive damages requires that they be subject to the protections afforded by the Eighth Amendment's Excessive Fines Clause. At a minimum, such protections include (1) clearly defined standards of wrongful conduct that must be proven before punishment can be imposed, (2) fixed limits or clear guidelines by which the trier of fact might assess the amount of punishment to impose, and (3) objective standards for judicial review of the propriety of punitive damages awards. Absent some such standards to guide decisionmakers, the chance of achieving proportionality in such awards is merely that—a random chance. Awards rendered in the absence of standards are inherently suspect and should, at a minimum, be subjected to heightened judicial scrutiny for proportionality.

1. *The Excessive Fines Clause is Violated Where Punitive Damages are Imposed Without Clearly Defined Standards.*

As discussed above, the States employ vague, differing and often unintelligible standards to define the type of wrongful conduct that will render a defendant subject to punitive damages penalties. An award of punitive damages in such circumstances, as occurred in this case, is "excessive" under tests applied by this Court for evaluating whether a punishment violates the Excessive Fines Clause of the Eighth Amendment.

Of principal import, a "punishment is excessive . . . if it is unnecessary." *Furman v. Georgia*, 408 U.S. 238, 279 (1972) (Brennan, J., concurring). A punitive damages award imposed without clearly defined standards violates this test because it fails to serve a valid state interest. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) ("states have no substantial interest in securing for plaintiffs gratuitous awards of money damages far in excess of any actual injury.") No valid state interests are served in such cases because standardless punitive damages awards fail to accomplish the deterrence and retributive goals furthered by such damages. Deterrence can occur only if persons to be deterred are informed in advance of the type of conduct that will result in punishment and the magnitude of sanctions that will be inflicted for that conduct. Proper retribution can occur only if the sanction is proportionate to the gravity of the misconduct.

2. *The Excessive Fines Clause Is Violated Where Punitive Damages are Imposed Without Clear Guidelines for the Trier of Fact to Apply in Determining the Amount of Punishment to Inflict.*

This Court has held that the Eighth Amendment requires that "a criminal sentence must be proportionate to the crime for which the defendant has been convicted."

Solem v. Helm, 463 U.S. 277, 290 (1983). This Court has also noted that the Eighth Amendment "imposes 'parallel limitations' on bail, fines, and other punishments." *Id.* at 289, *quoting Ingraham v. Wright*, 430 U.S. 651, 664 (1977).

Where a trier of fact is given no fixed limits or clear guidelines for calculating a proper punishment, any relationship between the punitive award in one case, and the punitive award for the same or different conduct in another case, is merely coincidental. Yet the concept of proportionality demands at least some common points of reference, or attempts at comparison, so that a scale of measurement—indeed, of proportion—might be derived. Where the whim of the individual factfinder is the only standard, it is simply impossible and unreasonable to expect proportionality to be achieved.

Thus, this case suffers from precisely the same Eighth Amendment defects isolated in *Browing-Ferris*. Reversal in that case demands reversal here.

II. KANSAS' COMPENSATORY DAMAGES RULE, AS APPLIED IN THIS CASE, DEPRIVES PETITIONERS OF DUE PROCESS AND CONFLICTS WITH ESTABLISHED PRINCIPLES OF TAKINGS JURISPRUDENCE.

This case features the unusual situation in which a compensatory damages rule conflicts with constitutional principles. *Amicus* recognizes, of course, that to a great extent, damages rules may be devised by the States, and applied by the courts, without fear of trammeling upon constitutional interests. Nonetheless, a rule of law that, both by its terms and as applied in this case, purports to measure "compensation" for a temporary and partial destruction of property with a figure far in excess of the actual total value of the property, and purports to provide for continuing damages over time, cannot fairly be characterized as providing mere compensation. Nor

does such a rule serve any legitimate government purpose. This Court should grant petitioners' petition for a writ of certiorari to decide the important and admittedly novel question whether, and at what point, a state compensatory damages rule such as that applied to petitioners veers so far from the underlying goal of compensation and economic rationality as to run afoul of basic principles of due process and common understandings about the value of land implicit in the Takings Clause.[9]

A cornerstone of due process jurisprudence is that government action must, at bottom, rest upon a modicum of reasonableness, *FPC v. Natural Gas Pipeline Co.*, 315 U.S. 575, 585 (1942) (due process requires that regulated rates fall within a "zone of reasonableness"), and "fundamental fairness," *Lassiter v. Department of Social Services*, 452 U.S. 18, 24 (1981). Thus, this Court recently reiterated that due process is violated by government action which is "arbitrary, discriminatory, or demonstrably irrelevant to the policy the [government] is free to adopt." *Pennell v. City of San Jose*, 108 S.Ct. 849, 857 (1988) (in context of price controls) (quoting *Permian Basin Area Rate Cases*, 390 U.S. 747, 769-70 (1983), quoting *Nebbia v. New York*, 291 U.S. 502, 539 (1934)); *see also Daniels v. Williams*, 474 U.S. 327, 331 (1986) (citations omitted) (due process "protect[s] . . . against arbitrary action of government"). A related and equally fundamental limitation on government action is imposed by the Takings Clause, which, in the oft-quoted words of Justice Holmes, provides that "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). *See also First English Evangelical Lutheran Church of Glendale*

[9] The principles informing the Takings Clause have been extended to the states through the Due Process Clause of the Fourteenth Amendment. *Hawaii Housing Authority v. Midkiff*, 467 U.S. 229, 231, 244 n.7 (1984).

v. Los Angeles, 107 S.Ct. 2378, 2386 (1987) (same).[10] The premises of takings analysis provide one further insight: The historic remedy for a taking of land is compensation for the *value* taken. Kansas' compensatory damages rule, as applied in this case, offends established standards of due process as well as fundamental principles underlying takings jurisprudence.

The award of compensatory damages in this case, imposed to compensate for an injury to property, in fact exceeds by multiples the total value of the property itself and, certainly, the diminution of value to that property.[11] Moreover, the award is *perpetual*. Respondents may continuously return to the court for additional damages, again deemed "compensatory," and again in amounts above and beyond any fair valuation of the property. This perverse result cannot be reconciled with the underlying purpose of compensatory damages, which, by definition, is to *compensate* for injury suffered. It is axiomatic that the goal of compensation is fully realized in the context of property damage when the wronged party is awarded the full value of the land itself. *See* Restate-

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[10] In recent rulings, the Court has at times refrained from distinguishing between the Due Process and Takings Clauses in articulating constitutional restraints on government action. *See, e.g., FCC v. Florida Power Corp.*, 480 U.S. 245, 253 (1987) (citing "traditional Fifth Amendment standards"); *FPC v. Texaco Inc.*, 417 U.S. 380, 391-92 (1974) (applying "constitutional" limitations); *but cf. Pennell, supra* (considering each provision separately). The Court has repeatedly emphasized, moreover, that takings analysis rests not on generally applicable black-letter principles, but rather on "essentially ad hoc, factual inquiries." *Kaiser Aetna v. United States*, 444 U.S. 164, 175 (1979); *Penn Central Transp. Co. v. New York City*, 438 U.S. 104, 124 (1978); *see also Goldblatt v. Hempstead*, 369 U.S. 590, 594 (1962) ("[t]here is no set formula to determine where regulation ends and taking begins").

[11] There appears to be no dispute that the "temporary damages" awarded to respondents far exceed the diminished market value of the land and the amount of permanent damages thereto. *See* Pet. Br. at 6 n.7.

ment (First) of Torts § 931 comment a (1939) ("A person whose land has been damaged is entitled to compensation for the difference between its value before and after the harm"); *cf.* M. Friedman, *Contracts and Conveyances of Real Property* 914 (4th ed. 1984) (seller's damages for buyer's breach of agreement to sell land is "measured by the difference between the purchase price and the market value of the property"); 11 S. Williston, *Contracts* § 1399 (3d ed. 1968); 77 Am. Jur. 2D *Vendor and Purchaser* § 489 (1975) (same).[12]

It is the continuing aspect of respondents' award that, for constitutional purposes, is its principal undoing. Kansas might well justify a compensatory award for *past* injury as reflecting the actual economic losses suffered by respondents prior to the litigation. But the *future* element of the instant award—under which respondents can bring suit every two years to recover additional damages for the same injury to the same land—can only be understood as effecting a continuing subsidy of respondents' future operations.

Consistent with basic principles of economics and property law, a company in the position of petitioners has historically been able to avoid damages laibility for the destruction of some other private owner's land simply by purchasing that land (or an easement in that land) at its fair market value. *Cf. supra* (citing authorities on valuation of property). Under the Kansas damage law applied below, however, it is far more advantageous to the respondents to remain on the land indefinitely, *and to continue to suffer the injury for which*

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[12] So embedded is this principle of property valuation that the proper measure of damages for the government's taking of property is its "market value at the time of the taking." P. Freund, *Constitutional Law* 1102 (1977) (recognizing this as an "elementary principle").

they can collect damages,[13] than simply to sell the land at either its current market price or at the market price it would have commanded if the injury had never occurred. Even though elementary economics and principles of property law suggest that a sale of the land would be the most efficient and appropriate result,[14] under the court's award one can expect that no sale of the property will ever occur. By employing the biennial damages calculation to tax petitioners with the continuing losses that respondents are imposing upon themselves by continuing to use the land, respondents can realize a total recovery many times greater than their present injury, a recovery far out of proportion to the value of the property said to have been destroyed.

A continuing damages remedy of this kind, in this context, amounts to nothing less than a continuing subsidy of respondents' activities, the *entire* burden of which is borne, privately, by petitioners. Such a subsidy cannot be squared with the Fifth and Fourteenth Amendments. *See First English Evangelical*, 107 S.Ct. at 2388 (Takings Clause is "designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole") (quoting *Armstrong v. United States*, 364 U.S. 40, 49 (1960)); *Hawaii Housing Authority*, 467 U.S. at 241. Such a damages scheme also violates the axiomatic tenet, central to all takings jurisprudence, that govern-

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[13] As petitioners note, the injury to the land in question likely will not be abated for more than a century. *See* Pet. Br. at 5, 18-19. The Court of Appeals acknowledged the uncertainty posed by the lower court's award, observing that "no conclusive time frame for the cleansing of the aquifer has been established. . . ." 858 F.2d at 1455.

[14] In effect, an award of damages measured by the diminution in the value of the property on account of the nuisance reflects the fair market value for an easement to permit the continued intrusion on the land.

ment cannot "take property from A and give it to B." *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798). Kansas' damages rule works precisely this result, constituting as it does little more than a substantial reallocation of private resources from one category of landowners to another, encompassing amounts beyond the conceded economic *value* of the property being damaged.

That Kansas has imposed this redistributive subsidy under the guise of a common law damages award, rather than through legislation, cannot be understood to immunize the effects of such action from constitutional scrutiny. Takings analysis turns not on the source of government action—whether it be a legislature, a zoning board, a rent control or planning commission, or, as in this case, a court's application of aberrational damages theories—but rather on its purposes and overall impact. *Cf. FPC v. Hope Natural Gas Co.*, 320 U.S. 591, 602 (1944) ("It is not the theory but the impact of the rate order which counts" for purposes of taking analysis).[15] Here, the financial impact on petitioners of Kansas' property damage laws is not only staggering, but is grossly disproportionate to the undisputed value of the property at issue. And whereas under any rational economic analysis a landowner who is found liable for value to adjoining property can avoid future injury by purchasing the property at fair market value, that cannot occur here. Instead, it is the producer that must shut down *its* business to abate the nuisance. This is government action in its most capricious form, action whose severity and capriciousness will continue to grow over time as

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[15] That takings jurisprudence does not discriminate based on the locus of government action is apparent from the wide variety of governmental bodies whose actions have come under its scrutiny. *E.g., First English Evangelical, supra* (county ordinance); *Penn Central, supra* (denial by zoning commission of approval to make exterior alterations on historical landmark); *Nollan v. California Coastal Comm'n*, 107 S.Ct. 3141 (1987) (permitting scheme of a state coastal commission).

respondents return to court at two-year intervals to seek still further "compensatory" damages awards for continuing (albeit "temporary") damage to their property.[16]

This nation's historical understandings of economic value are nowhere more firmly established than in the realm of real property. Our measures of the value of real property are timeworn and firmly rooted in our jurisprudence. Thus, in measuring compensation for damages to real property, courts must be cautious lest they lose sight of our historical frame of reference—*i.e.*, the measure of injury to real property must, at some core level, bear some direct relationship to the value of the property destroyed.

The profound threat and uncertainty presented manufacturers and mining interests by a damages theory allowing for perpetual subsidy of uncertain magnitude is apparent. The Court should grant certiorari to decide the fundamental question whether, and to what extent, such perpetual damage rules for injury to property are circumscribed by the Fourteenth Amendment.

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[16] As noted in petitioners' brief, respondents have already initiated their quest for additional relief, having filed two additional suits seeking, *inter alia*, $2 million in compensatory damages annually for each two-year period. Pet. Br. at 5 n.6, 19.

CONCLUSION

This case suffers from the same flaws with respect to the punitive damages award as does *Browning-Ferris*, now pending on writ of certiorari. In addition, it presents issues regarding Fifth and Fourteenth Amendment limitations on awards of punitive damages and compensatory damages for injuries to real property, that independently warrant issuance of a writ of certiorari in this case.

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